SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 561

INTERNATIONAL MILLING COMPANY,
PETITIONER,

vs.

COLUMBIA TRANSPORTATION COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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IN SUPREME COURT OF MINNESOTA, 1933

29466

IN DISTRICT COURT OF ST. LOUIS COUNTY, ELEVENTH JUDICIAL DISTRICT

INTERNATIONAL MILLING COMPANY, a Corporation, Plaintiff,

vs.

THE COLUMBIA TRANSPORTATION COMPANY, a Corporation, Defendant

SUMMONS

The State of Minnesota to the above named Defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in the above entitled action, which [fol. 2] is filed in the office of the Clerk of the District Court of the Eleventh Judicial District in and for the County of St. Louis and State of Minnesota, and to serve a copy of your answer to the said complaint on the subscribers, at their offices, 1200 Alworth Building, Duluth, Minnesota, within twenty days after the service of this summons upon you, exclusive of the day of such service; and if you fail to answer said complaint within the time aforesaid, the plaintiff in this action will take judgment against you for the sum of Nineteen Thousand Two Hundred Sixty-two and 80/100 Dollars ($19,262.80), with interest at the rate of six per cent per annum from the 7th day of May, 1930, together with the costs and disbursements of this action.

Dated June 17, 1932.

Mitchell, Gillette & Carmichael, Attorneys for Plaintiff, 1200 Alworth Building, Duluth, Minnesota.

IN DISTRICT COURT OF ST. LOUIS COUNTY

SHERIFF'S CERTIFICATE OF PERSONAL SERVICE

STATE OF MINNESOTA,
County of St. Louis, ss:

I hereby certify and return, that at Duluth in the County and State aforesaid, on the 1st day of July, A. D. 1932, I

served the Summons and Complaint hereto attached upon [fol. 3] the within named, The Columbia Transportation Company, a corporation, personally, by handing to and leaving with O. A. Hentz, Master of said Company, a true and correct copy thereof.

Dated at Duluth, Minnesota, this 1st day of July, 1932.

Sheriff's Fees, Service	$1.00
Travel	$
Total	$1.00

Samuel M. Owens, Sheriff of St. Louis County, Minnesota, by Sam Altman, Deputy Sheriff.

IN DISTRICT COURT OF ST. LOUIS COUNTY

COMPLAINT

Comes now the above named plaintiff, and for a cause of action against the above named defendant, alleges:

1. That during all of the times herein stated the plaintiff has been and still is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, having its principal office and place of business and its executive offices in Minneapolis, Minnesota, and only employs in the State of Delaware a resident agent, but transacts no business in the State of Delaware of any kind [fol. 4] or nature, except what is incidental yearly to the filing of annual reports with the State of Delaware.

2. That the defendant is a corporation duly organized and exsiting under and by virtue of the laws of the State of Delaware.

3. That at all times hereinafter mentioned and up until December 28, 1931, the Columbia Steamship Company, hereinafter referred to as the "carrier", owned and operated a certain vessel or steamer known as the "W. C. Richardson", and it was then engaged in the business of transporting merchandise or property in said vessel between ports on the Great Lakes and was engaged in what is known as the winter storage of grain business, and since

December 28, 1931, the defendant has been the owner of the Steamer "W. C. Richardson" and it is now engaged in the business of transporting merchandise or property in said vessel between ports on the Great Lakes, and is engaged in what is known as winter storage of grain business.

4. That during all of the times herein mentioned, the plaintiff, hereinafter referred to as the "shipper", was engaged in the business of buying, selling, milling and shipping grain.

5. That on or about and from December 28, 1929, to January 2nd, 1930, at South Chicago, Illinois, the shipper through its agents, Bartlett, Frazer & Company, delivered to the carrier 179,030.50 bushels of No. 2 Hard Wheat, and 64,977.30 bushels of No. 1 Northern Spring Wheat on board [fol. 5], said carrier's Steamer "W. C. Richardson" for storage at Chicago in said steamer until on or about May 1, 1930, and then for transportation to Buffalo, New York, and for a valuable consideration duly paid by said shipper to said carrier, the carrier then agreed to store and later promptly transport said wheat on said vessel to Buffalo, New York, and deliver the same in like good order and condition as received, the dangers of navigation, fire and collision excepted; that said wheat was in good order and condition when delivered to carrier. That said wheat was consigned to the shipper, International Milling Company.

6. That pursuant to said agreement, the carrier stored said wheat at South Chicago, Illinois, in said Steamer "W. C. Richardson" and later transported said wheat to Buffalo, New York, where said vessel arrived on or about May 7, 1930, when the carrier delivered said wheat to shipper, said wheat, however, not being in the same good order and condition in which it had been delivered to carrier, but that the same had become wet, damp and heated, causing some of the wheat to become sprouted, spoiled and damaged while under the care and control of carrier; that approximately 65,242.43 bushels of said wheat were in a badly spoiled and damaged condition; that the damage and injury sustained by said wheat was not caused by dangers of navigation, or of fire, or of collision, but was caused by the carrier negligently permitting said wheat to become wet,

damp and heated, thereby sprouting, spoiling and damaging the same.

[fol. 6] 7. That the shipper is engaged in the business of milling wheat and buying and selling wheat, and the shipper intended to either mill said wheat at Buffalo, New York, or to sell the same; that when said wheat was delivered to carrier it was in good order and condition for sale, but when removed from said vessel at Buffalo for redelivery to the shipper, a large portion of it was badly spoiled and damaged, but if properly handled and treated could be put in condition for sale; that after said wheat had been unloaded in elevators at Buffalo, shipper took the damaged wheat and had it treated and handled, by agreement of all parties concerned, for the purpose of treating and putting it in the best possible condition, which was done at the expense of shipper of $3,789.78, and the incurring of such expense was necessary in order to lessen the damage to said wheat; that said 65,242.43 bushels of wheat were reconditioned, and after reconditioning weighed 63,163.20 bushels, making a loss in shrinkage and damage to shipper of 2,079.23 bushels, that were reasonably worth $2,315.54; that in addition thereto, shipper had certain other necessary expenses, which expenses were necessary in order to lessen the damage to said wheat, consisting of shoveling, $13.45, separating, $42.75, towing, $86.28, inspection, $82.10, weighing, $51.28, shovels, $5.76, and reloading, $38.42; that said 65,242.43 bushels of wheat were reconditioned, and in reconditioning were separated into two lots—one lot consisting of 27,720 bushels, and the second lot, 35,443.20 bushels; that after the reconditioning, Lot 1 did not grade, and it was necessary to dispose thereof by sam-
[fol. 7] ple, and Lot 2 graded No. 3 Northern Spring Wheat.

8. That the market price and the reasonable value of No. 1 Northern Spring Wheat was, at Buffalo, New York, on May 7, 1930, $1.11⅜ per bushel.

9. That Lot 1, after reconditioning, was offered for sale to the highest bidder, and on May 28, 1930, was sold for eighty-four cents ($.84) per bushel, which was the reasonable value thereof, whereby the shipper sustained a loss of $7,587.25, being the difference in value of said wheat in the condition in which it was delivered to carrier, and the rea-

sonable value of the same in the condition in which it was redelivered to shipper; that Lot 2, grading No. 3 Northern Spring Wheat, was sold by the shipper after it was reconditioned, and as speedily as possible, on May 28, 1930, for ninety-six cents ($.96) per bushel, whereby the shipper sustained a loss in amount of $5,250.19, being the difference in value of said wheat in the condition in which it was delivered to carrier, and the reasonable value of the same in the condition in which it was redelivered to shipper, making a total amount of damage sustained by shipper in the sum of $19,262.80.

10. That on or about December 28, 1931, the Columbia Steamship Company transferred all of its property, including vessels, to the Columbia Transportation Company, and since December 28, 1931, your plaintiff is informed and believes, and alleges the fact to be, that the Columbia Steamship Company has been without any assets whatever.

[fol. 8] 11. That on or about December 28, 1931, the defendant, The Columbia Transportation Company, as a part of the consideration for the transfer on said day made to it by the Columbia Steamship Company of all of its property and assets, assumed and agreed to pay all the debts and liabilities of the Columbia Steamship Company.

12. That the defendant transacts no business in the State of Delaware, and has only in the State of Delaware a resident agent, but transacts all its business, which consists of a steamboat business, upon the Great Lakes.

Wherefore, plaintiff demands judgment against the defendant for the sum of $19,262.80, with interest thereon at the rate of six per cent (6%) per annum from May 7, 1930, together with the costs and disbursements of this action.

Mitchell, Gillette & Carmichael, Attorneys for Plaintiff, 1200 Alworth Building, Duluth, Minnesota.

IN DISTRICT COURT OF ST. LOUIS COUNTY

AFFIDAVIT OF H. A. CARMICHAEL

STATE OF MINNESOTA,
County of St. Louis, ss:

H. A. Carmichael, being first duly sworn, says that he is one of the attorneys for the plaintiff in the above en-

titled action; that a cause of action exists against the above [fol. 9] named defendant in the amount of Nineteen Thousand Two Hundred Sixty-two and 80/100 Dollars ($19,262.80), with interest at the rate of six per cent per annum from May 7, 1930; that the ground thereof is a breach of contract for safely storing grain, entered into by the Columbia Steamship Company, which company was bought out on December 28, 1931 by the defendant, and the defendant assumed and agreed to pay all of the claims against the Columbia Steamship Company; that the defendant is a foreign corporation, and has, as affiant is informed and believes, its principal office and place of business at Cleveland, Ohio.

Further affiant saith not, except that this affidavit is made for the purpose of laying the foundation for a writ of attachment.

H. A. Carmichael.

Subscribed and sworn to before me this 17th day of June, 1932. Edith Sundholm, Notary Public, St. Louis County, Minn. My Commission expires Sept. 16, 1938. (Notarial Seal.)

[fol. 10] In District Court of St. Louis County

Undertaking

Know all men by these presents, That we, National Surety Company, a corporation formed under the laws of the State of New York, holding a license to transact business as a surety in the State of Minnesota, are held and firmly bound unto The Columbia Transportation Company, a corporation, in the sum of Two Hundred Fifty Dollars ($250.00) lawful money of the United States, to be paid unto the said The Columbia Transportation Company, its successors or assigns, for which payment well and truly to be made we bind ourselves, our successors and assigns, firmly by these presents.

Sealed with our seals and dated this 17th day of June, 1932.

The condition of this obligation is such that whereas the above named plaintiff has applied for Writ of Attachment

against the property of The Columbia Transportation Company, a corporation, the defendant in said action, and has filed an affidavit pursuant to the statute in such case made and provided;

Now, therefore, in case the defendant recover judgment, or in case the Writ shall be set aside or vacated, if the said plaintiff will pay all the costs that may be awarded to the said defendant and all the damages it may sustain by reason of this attachment, not exceeding the penalty of this [fol. 11] undertaking, then this obligation shall be void; otherwise to remain in full force.

In witness whereof, said surety has caused these presents to be signed by its Attorney-in-fact and its corporate seal to be hereto attached by authority of its Board of Directors, this 17th day of June, A. D. 1932.

National Surety Company, by P. F. Otis, Its Attorney-in-Fact.

Signed, Sealed and Delivered in Presence of Ida F. Thompson, H. A. Carmichael. (Corporate Seal.)

STATE OF MINNESOTA,
County of St. Louis, ss:

On this 17th day of June, 1932, before me appeared P. F. Otis, to me personally known, who being by me duly sworn, did say that he is Attorney-in-fact for National Surety Company, a corporation; that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that said instrument was executed in behalf of said corporation by P. F. Otis by authority of its Board of Directors; and the said P. F. Otis acknowledged said instrument to be the free act and deed of said corporation.

H. A. Carmichael, Notary Public, St. Louis County, Minn. My commission expires May 10, 1938. (Notarial Seal.)

[fol. 12] I hereby approve the within Undertaking and the surety thereon, and let Writ of Attachment issue.

Dated June 17, 1932.

By the Court.

Bert Fesler, Judge.

IN DISTRICT COURT OF ST. LOUIS COUNTY

SHERIFF'S LEVY

STATE OF MINNESOTA,
County of St. Louis, ss:

I hereby certify and return, That under and by virtue of the Writ of Attachment, hereto attached, I have this 1st day of July, 1932, levied upon and attached all right, title and interest of The Columbia Transportation Company, a corporation, defendant named therein, in and to the following described personal property, to-wit: The Steamer C. Russel Hubbard.

Dated this 1st day of July, 1932.

Sam M. Owens, Sheriff of St. Louis County, Minnesota, by F. K. Randall, Deputy.

[fol. 13] IN DISTRICT COURT OF ST. LOUIS COUNTY

SHERIFF'S CERTIFICATE OF PERSONAL SERVICE

STATE OF MINNESOTA,
County of St. Louis, ss:

I hereby certify and return, that at Duluth in the County and State aforesaid, on the 1st day of July, A. D. 1932, served the Writ of Attachment hereto attached upon the within named, The Columbia Transportation Company, a corporation, personally, by handing to and leaving with O. A. Hentz, Master of said Company, a true and correct copy thereof.

Dated at Duluth, Minnesota, this 1st day of July, 1932.

Samuel M. Owens, Sheriff of St. Louis County, Minnesota, by Sam Altman, Deputy Sheriff.

Sheriff's Fees, Service	$1.00
Travel	$3.00
Total	$4.00

IN DISTRICT COURT OF ST. LOUIS COUNTY

WRIT OF ATTACHMENT

The State of Minnesota, to the Sheriff of the County of St. Louis:

Whereas, In the above entitled action, an application has [fol. 14] been duly made to the proper officer for a Writ of Attachment against the property of The Columbia Transportation Company, a corporation, Defendant therein, setting forth by affidavit that a cause of action exists against such Defendant, and specifying the amount of claim, and the ground thereof; and that the Defendant is a foreign corporation; and the bond required by law has been duly executed and filed, and said Writ allowed and directed to issue by said officer.

Therefore, You are hereby commanded and required to attach and safely keep all of the property of said The Columbia Transportation Company, a corporation, within your County and not exempt from execution, or so much thereof as may be sufficient to satisfy the said Plaintiff's demand, which amounts to the sum of Nineteen Thousand Two Hundred Sixty-two and 80/100 ($19,262.80) Dollars, with interest thereon at six per cent (6%) per annum from May 7, 1930, as appears by the complaint in said action, together with costs and expenses, and that you proceed herein in the manner required of you by law.

Witness the Honorable Bert Fesler, Judge of the District Court aforesaid at Duluth, Minnesota, this 17th day of June, in the year 1932.

J. P. Johnson, Clerk of Court, by R. L. Johnson, Deputy Clerk.

[fol. 15] IN DISTRICT COURT OF ST. LOUIS COUNTY

UNDERTAKING

Know all men by these presents, That Hartford Accident & Indemnity Company, a corporation organized and existing under the laws of the State of Connecticut and duly authorized to transact business and act as surety in the State of Minnesota under and by virtue of the laws of said State, is held and firmly bound unto International Milling Company, plaintiff in the above entitled action, in the

sum of Forty Thousand and no/100 Dollars ($40,000), to the payment of which sum to the said International Milling Company, plaintiff, or its heirs, administrators or assigns, the Hartford Accident & Indemnity Company hereby binds itself, its successors and assigns.

The condition of this obligation is such that, whereas a writ of attachment has been issued in the above entitled action against the Steamship C. Russell Hubbard, the property of the defendant therein; now, therefore, if the plaintiff shall recover judgment in said action and the defendant shall pay the amount of such judgment, together with all costs that may be awarded to the said plaintiff, then this obligation which is given in pursuance of General Statutes of Minnesota for 1923, Section 9383, shall be void; otherwise, to remain in full force.

In testimony whereof, The said Hartford Accident & [fol. 16] Indemnity Company has caused these presents to be executed by its attorneys-in-fact, this 1st day of July, 1932.

Hartford Accident & Indemnity Company, by W. H. Jones, Attorney-in-Fact.

Attest:

I. W. Cohler.

In presence of:

Ruth I. Brostrom. Verna G. Foster.

STATE OF MINNESOTA,
County of St. Louis, ss:

On this 1st day of July, 1932, before me, a Notary Public within and for said County and State, personally appeared W. H. Jones and I. W. Cohler, who being first duly sworn, did say that they are Attorneys-in-Fact of Hartford Accident & Indemnity Company, the corporation named in and which executed the foregoing instrument; that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was executed in behalf of said corporation by authority of its Board of Directors, and the said W. H. Jones and I. W. Cohler acknowledged said instrument to be the free act and deed of said corporation.

M. R. Sweum, Notary Public St. Louis County, Minn. My Commission expires Feb. 14, 1937. (Notarial Seal.)

[fol. 17] IN DISTRICT COURT OF ST. LOUIS COUNTY

ORDER DISCHARGING WRIT OF ATTACHMENT

Upon the foregoing undertaking, which is hereby approved,

It is ordered. That the writ of attachment issued out of this Court in the above entitled action on the 1st day of July, 1932, be and the same hereby is discharged.

Dated at Duluth, Minnesota, this 1st day of July, 1932.

C. R. Magney, District Judge.

IN DISTRICT COURT OF ST. LOUIS COUNTY

ORDER TO SHOW CAUSE

It appearing to the satisfaction of the Court that the motion indicated in the attached Notice of Motion should be heard on a shorter notice than eight days, on motion of Abbott, MacPherran, Dancer, Gilbert & Doan, attorneys for the defendant, appearing specially for the purpose of this motion only,

It is ordered that the plaintiff show cause before the Court at Chambers in the City of Duluth, Minnesota, on the 18th day of July, 1932, at 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an order should not be made for the relief specified in the attached Notice of Motion.

[fol. 18] It is further ordered, that service of this order and the attached Notice and affidavits be made on the attorneys for the plaintiff by exhibiting to them the originals thereof and leaving with them copies on or before the 13th day of July, 1932, and that all proceedings herein on the part of the plaintiff be, and the same hereby are, stayed until the hearing and determination of said motion.

Dated July 12, 1932.

Bert Fesler, District Judge.

IN DISTRICT COURT OF ST. LOUIS COUNTY

NOTICE OF MOTION

Take notice that on the files and proceedings herein and the affidavits, of which copies are herewith served upon

you the defendant, appearing specially for the purpose of this motion only, will move the Court at a time and place to be fixed in the Order to Show Cause hereto attached for orders as follows:

1. Setting aside the purported service of the summons in the above entitled action claimed to have been made on the defendant on July 1, 1932, and vacating and setting aside the attachment and purported service and levy thereof on July 1, 1932, by the sheriff of St. Louis County, Minnesota, upon the ground and for the reason that heretofore in an action between the same parties in interest in the above entitled action on the same cause of action as the cause of action herein and upon the same procedure the [fol. 19] Court on March 2, 1932, made and filed an order setting aside the purported service of summons and vacating and setting aside the attachment therein and that said order was an order affecting a substantial right, a right identical with that involved in the above entitled action, was appealable, made in determining a motion after a full hearing had been had on the controverted question of fact and deciding a point litigated; and that upon reargument of said motion the Court on April 19, 1932, made and filed its order affirming said order of March 2, 1932.

2. Setting aside and vacating the writ of attachment and the purported service and levy thereof by the Sheriff of St. Louis County, Minnesota, on July 1, 1932, upon the ground and for the reason that the said purported service and levy of said writ of attachment and the prosecution of said action in this court operate to place unreasonable conditions, burdens and restraints upon defendant's constitutional right to engage in interstate commerce in violation of the provisions of Article I, Sec. 8, Subdivision 3 of the Constitution of the United States (the Commerce clause).

3. Setting aside the purported service of the summons in the above entitled action claimed to have been made on the defendant by delivering a copy thereof to Otto Gentz on the 1st day of July, 1932, upon the ground and for the reason that the said purported service and the prosecution of said action in this court operates to place unreasonable conditions, burdens and restraints upon defendant's constitutional right to engage in interstate commerce in viola- [fol. 20] tion of the provisions of Article I, Sec. 8, Subdi-

vision 3 of the Constitution of the United States (the Commerce clause).

Abbott, MacPherran, Dancer, Gilbert & Doan, Attorneys for Defendant, Suite 1001 Alworth Bldg., Duluth, Minn.

IN DISTRICT COURT OF ST. LOUIS COUNTY

AFFIDAVIT OF OTTO GENTZ

STATE OF MINNESOTA,
County of St. Louis, ss:

Otto Gentz, being first duly sworn, deposes and says that he resides in Chicago, Illinois; that on July 1, 1931, and at the present time, and for some time prior thereto, he was and still is employed as master of the steamer C. Russell Hubbard; that he has been master of said vessel since the opening of navigation on the Great Lakes for the present season; that on June 28, 1932, about 3:40 A. M. o'clock (Eastern Standard Time) said steamer Hubbard, with affiant as master, left the port of Sandusky, Ohio, laden with a cargo of coal, and bound for the port of Allouez, Wisconsin; that he received sailing instructions by long distance telephone from John T. Kelly, Manager of The Columbia Transportation Company, owner of said vessel, and then at Cleveland, Ohio, before leaving the port of Sandusky, [fol. 21] Ohio, directing that the Hubbard proceed to Allouez, Wisconsin with said cargo; that he received no counter-orders at Sault Ste. Marie, Michigan, or any other place on the upbound voyage to the head of Lake Superior; that he arrived at the Superior, Wisconsin Harbor Entrance, through which the vessel passed into the Harbor at 10:20 A. M. o'clock (Eastern Standard Time) July 1, 1932; that he did not enter the Harbor through the Minnesota entry; that he immediately proceeded to Dock No. 5, of the Pittsburgh Coal Company, Allouez, Wisconsin, which dock is located in Allouez Bay; that he arrived at said dock at 10:50 A. M. o'clock (Eastern Standard Time) July 1, 1932 and made his vessel fast port side to said dock heading toward shore, with the stern of the vessel being inside, that is shorewards from the outer end of the dock; that at no time was said steamer C. Russell Hubbard in Minnesota or Minnesota waters; that very shortly after said vessel's arrival at said

dock unloading operations were commenced; that about 12 M. o'clock (Eastern Standard Time) July 1, 1932 a man came aboard said vessel and informed affiant that he was from the sheriff's office in Duluth and that he had come to attach said vessel; that said man then handed this affiant papers which appeared to be a summons and writ of attachment; that this act of handing your affiant the papers was done while your affiant was aboard said vessel and while said vessel was tied to the dock at Allouez, Wisconsin and was being unloaded by the dock crew; that it did not seem proper to your affiant for a deputy from Minnesota to come over into Wisconsin and attempt to tie up a boat which at [fol. 22] the time of service of the papers was moored to a Wisconsin dock; that your affiant called his company's owners immediately, informing them of the attachment of said vessel; that your affiant was notified about an hour later that a release bond had been secured and the vessel was released of attachment by said sheriff; that said vessel had on at the time of her arrival at Allouez, Wisconsin, about 10,000 tons of soft coal; that she discharged about 7,500 tons at said dock No. 5 of the Pittsburgh Coal Company at Allouez, Wisconsin; that thereafter she proceeded to the Pitsburgh Coal Company Dock No. 7, located at Duluth, Minnesota, to discharge the remainder of her cargo; that said vessel, when completely discharged, proceeded to the port of Ashland, Wisconsin, where she took on a cargo of iron ore for delivery at a Lake Erie port.

Further affiant sayeth not.

Otto Gentz.

Sworn to before me and subscribed in my presence this 11th day of July, 1932. E. W. MacPherran, Notary Public, St. Louis Co., Minn. My commission expires Nov. 11, 1934. (Notarial Seal.)

[fol. 23] In District Court of St. Louis County

Affidavit of L. M. Leonard.

State of Ohio,
Cuyahoga County, ss:

L. M. Leonard, of Cleveland, Ohio, being first duly sworn, on oath deposes and says:

1. That he is now, and since about November 6, 1931, has been, continuously, the duly authorized and acting Secretary of The Columbia Transportation Company, a corporation which is now, and since on or about December 28, 1931, has been owner of the steamers W. C. Richardson and C. Russell Hubbard; that said The Columbia Transportation Company is a corporation duly authorized and existing under and by virtue of the laws of the State of Delaware; that the principal office and place of business of said corporation since its incorporation on or about November 5, 1931, has at all times been and now is in the State of Delaware; that the Articles of Incorporation of said company since its incorporation, and now, provide as follows: Its principal office is located at No. 100 West 10th Street in the City of Wilmington, County of Newcastle, in the State of Delaware."

2. That said corporation maintains an office for the transaction of corporate business in Cleveland, Cuyahoga County, Ohio; that said two offices are the only offices which said corporation maintains in the States of Delaware and Ohio, or in any other state or country.

[fol. 24] 3. That on or about July 1, 1932, a copy of summons and writ of attachment in the above entitled action were each attempted to be served upon Otto Gentz, master of the steamer C. Russell Hubbard, owned by said The Columbia Transportation Company, as and while said steamer lay on the east side of Pittsburgh Coal Company Dock No. 5, Allouez Bay, at Allouez, in the State of Wisconsin; and as affiant is informed and believes, and so states, such service was attempted to be made while the said steamer C. Russell Hubbard was being unloaded of a cargo of coal which had been transported on said steamer from Sandusky, Ohio, to said Allouez, Wisconsin, leaving Sandusky, June 28, 1932, and arriving at Allouez on July 1, 1932.

4. That said The Columbia Transportation Company is not qualified to do business in the State of Minnesota, and that the only business that it carries on is that of operating bulk freight steamers between various ports of the United States and between ports of the United States and Canada in interstate and foreign commerce; that it owns and operates ten freight steamers, except that during the present

navigation season of 1932 up to July 1st, said company operated but one steamer, to-wit, said steamer C. Russell Hubbard; that cargoes for said steamers are arranged for through the office of the company in Cleveland, Ohio; that the said The Columbia Transportation Company does not solicit any business in the State of Minnesota, nor does it make or perform any contracts within said state, and it carries on no activities within said state, except such as [fol. 25] are incidental to shipping and unloading of cargoes in interstate and foreign commerce, and at no time has said The Columbia Transportation Company had any agents in Minnesota or elsewhere outside of the State of Ohio to represent said company or its ships, except as from time to time they might be appointed or designated under limited authority to sign bills of lading or perform such other service as might be necessary to enable said ships to engage in interstate or foreign commerce.

5. That the contract respecting the storage and transportation involved in this suit was entered into by the then owner of the steamer W. C. Richardson at the City of Cleveland, Ohio; that the storage of the grain took place at South Chicago in the State of Illinois, in the steamer W. C. Richardson, then owned by The Columbia Steamslip Company, and now owned by the defendant, The Columbia Transportation Company; that said grain was transported by said steamer W. C. Richardson from South Chicago to Buffalo without entering the State of Minnesota, and that delivery of the grain under the contract was made at Buffalo in the State of New York.

6. That the persons who know the facts as to the storage of the grain at South Chicago and as to its transportation from South Chicago to Buffalo, and as to its condition when unloaded at Buffalo, are persons who have their residence at South Chicago and Chicago in the State of Illinois, or at Buffalo, in the State of New York, or were officers or members of the crew of the steamer Richardson; that the Captain of said steamer Richardson lives at Buffalo, New York, the Chief Engineer lives at Cheboygan, [fol. 26] Michigan, the Shipkeeper and Watchman live in Chicago, Illinois, and that four members of the crew live at Marine City, Michigan, Milwaukee, Wisconsin, Buffalo, New York and Cleveland, Ohio, respectively; that five of

the marine surveyors who know the facts relative to the storage of the grain in said steamer Richardson live in Chicago, Illinois, and one of the marine surveyors who is acquainted with the facts relative to the grain at the time delivery was made at Buffalo, lives in Buffalo, New York; that all of said persons who know the facts in this case live outside of the State of Minnesota, and each and every one of them is a necessary witness for the defendant in this case; that the proper defense of this case by defendant would also require the attendance of several other witnesses from Buffalo in the State of New York; that the defendant cannot safely proceed to the trial of this case without said witnesses and that the burden of procuring the attendance of the above mentioned witnesses would impose great expense upon the defendant.

7. That the said Otto Gentz is not an officer of said The Columbia Transportation Company, and was not an officer of said company on July 1, 1932; that the said The Columbia Transportation Company has no officer now present within the State of Minnesota and had none present within that state, nor within the state of Wisconsin, on July 1, 1932, the date of said purported service of said summons and said writ of attachment.

8. That during and throughout the years 1929, 1930 and the year 1931, until and after December 28 of that year, [fol. 27] affiant was Secretary of The Columbia Steamship Company, an Ohio corporation, which, during the years 1929, 1930 and until December 28, 1931, was owner of the steamer W. C. Richardson; that said The Columbia Steamship Company was a corporation duly organized and existing under and by virtue of the laws of the State of Ohio; that the principal office and principal place of business of said corporation since its incorporation about November 16, 1920, and throughout the years 1929, 1930 and 1931, until and after December 28th of that year, at all times was in the State of Ohio, being at Mentor Special District in Mentor, Lake County, Ohio, where its principal business was transacted; that said corporation, throughout the years 1929, 1930 and 1931 maintained an office for the transaction of corporate business in Cleveland, Cuyahoga County, Ohio; that said two offices were the only offices which said corporation maintained in the State of Ohio or

in any other state or country during the years 1929, 1930 and 1931; that during said years 1929, 1930 and 1931 said corporation, The Columbia Steamship Company had and maintained no offices in Minnesota or elsewhere outside of Ohio.

9. That during the years and navigation seasons of 1929, 1930 and 1931, said corporation, The Columbia Steamship Company owned and operated a fleet of lake freight steamers, ten in number, among said steamers being the W. C. Richardson; that none of said steamers were common carriers, but all were engaged as private carriers in the transportation of bulk freight on the Great Lakes, exclusively in interstate commerce or in commerce between [fol. 28] a State of the United States and a Province of the Dominion of Canada. Said steamers transported coal from the ports of Lake Erie to ports on the upper lakes, principally to ports on Lake Michigan or on Lake Superior, and also transported ore and grain from ports on Lake Michigan and on Lake Superior principally to ports on Lake Erie or in Georgian Bay; none of said steamers had any regular routes or any regular sailing schedule, but took business as it could be secured, and almost exclusively the entire capacity of said ship was chartered to one shipper or charterer. The owner of said ships did not have any published tariffs and did not come under the jurisdiction either of the Interstate Commerce Commission or of the United States Shipping Board, and said ships did not operate in connection with or have joint rates with any railroads. At no time during the years 1929 and 1930 did said The Columbia Steamship Company have any agents located outside of the State of Ohio to represent said Company or its ships, except as from time to time they might be appointed or designated under limited authority to sign bills of lading or perform such other service as might be necessary to enable said ships to engage in interstate or foreign commerce.

10. That the said The Columbia Steamship Company was not in 1929 or 1930 or at any other time qualified to do business in the State of Minnesota, and had no agents in that state; that cargoes for its steamers were all arranged for through the office of the company in Cleveland, Ohio, and that said The Columbia Steamship Company did

[fol. 29] not solicit any business in the state of Minnesota, nor did it make nor perform any contracts within said state or carry on any activities within said state, except as incidental to the shipping and delivery of cargoes in interstate and foreign commerce; that on or about December 28, 1931, The Columbia Transportation Company, a Delaware corporation, acquired and took over the property, business and activities of The Columbia Steamship Company of Ohio, including the steamers that were owned by said The Columbia Steamship Company, among others the steamers W. C. Richardson and C. Russell Hubbard, and that since that time The Columbia Transportation Company has been engaged in interstate and foreign commerce in the same manner and under the same conditions as hereinbefore set forth with respect to the business of The Columbia Steamship Company.

11. That The Columbia Transportation Company, of Delaware, is in effect a reorganization of The Columbia Steamship Company, of Ohio, the Delaware corporation, on its organization, having the same amount of outstanding capital stock and the same number of shares of stock and the identical stockholders, share for share, as had The Columbia Steamship Company, and the directors of the Delaware Corporation being the same as of the Ohio Corporation, which latter company, on the transfer of its property to the Delaware corporation and the assumption of the Ohio corporation's liabilities by the Delaware corporation, discontinued business. The officers of the Delaware corporation are, except as to the Vice President, the [fol. 30] same as were the officers of the Ohio corporation.

L. M. Leonard.

Sworn to before and subscribed in my presence this 9th day of July, 1932. Harrie S. Taylor, Notary Public. (Notarial Seal.)

In District Court of St. Louis County

Affidavit of Robert G. McCreary

State of Ohio,
Cuyahoga County, ss:

Robt. G. McCreary, of Cleveland, Ohio, being first duly sworn, on oath deposes and says:

1. That he is an attorney at law and a member of the firm of Goulder, White, Garry & McCreary, attorneys at law, with offices at Cleveland, Ohio; that from the time of its incorporation in 1920, until and after December 28, 1931, The Columbia Steamship Company, an Ohio corporation, was a client of said firm; and that The Columbia Transportation Company, a Delaware corporation is now a client of said firm; that said The Columbia Steamship Company was engaged in the business of owning and operating bulk freighters on the Great Lakes, including the steamer W. C. Richardson.

[fol. 31] 2. That affiant personally made investigation of the claim of the International Milling Company against The Columbia Steamship Company and the Steamer W. C. Richardson, growing out of alleged damage to grain which was taken on board said steamer Richardson at South Chicago, in December, 1929, there held in winter storage and thereafter transported to and unloaded at Buffalo in May of 1930, and that affiant also personally represented said The Columbia Steamship Company and said steamer Richardson in litigation at Buffalo growing out of said claim on account of alleged damages to said cargo.

3. That affiant is acquainted with the cause of action set up in the case of Chance W. Clark against The Columbia Steamship Company brought in the District Court for St. Louis County, Minnesota on or about August 18, 1931, and he is also acquainted with the cause of action set up in the case of the International Milling Company v. The Columbia Steamship Company, a corporation, brought in District Court for St. Louis County, Minnesota on or about June 7, 1932, and likewise he is acquainted with the cause of action set up in the case of International Milling Company, a corporation against The Columbia Transportation Company, a corporation, brought in the District Court for St. Louis County, Minnesota, on or about July 1, 1932.

4. That on or about December 4, 1930 said International Milling Company, a corporation, filed a libel in admiralty in the United States District Court at Buffalo, in rem, against the steamer W. C. Richardson, seeking to recover [fol. 32] for damages alleged to have been sustained by said cargo taken aboard said steamer Richardson at South Chicago in December, 1929 and unloaded at Buffalo in May,

1930, and that the causes of action in the three suits in said District Court for St. Louis County, Minnesota, and in the suit in admiralty at Buffalo, were and are for the same alleged damage, and grew out of the same transaction; that on the filing of said libel in the United States District Court at Buffalo the steamer Richardson was seized by the United States Marshal; that the owner of the Richardson, the Columbia Steamship Company appeared and procured and gave bond in the amount of $38,000 to secure the release of said steamer; that the libel in said cause at Buffalo in effect alleged that the damage to the grain occurred either while the grain was being held in storage on the Richardson in Chicago during the winter of 1929-1930 or during its transportation to Buffalo; that for the owner of the Richardson, exceptions were filed to the libel stating that the libel was defective because the alleged cause of action was based on a contract separable in character containing both non-maritime and maritime undertakings and that the libel was indefinite and uncertain as to whether or not the alleged breach was of a maritime undertaking within the admiralty jurisdiction of the admiralty court and that the libel was defective because it did not allege that the damage to the cargo alleged to have been sustained occurred during the time it was on the steamer Richardson under a maritime contract, within admiralty jurisdiction; the exceptions were sustained and the libelant was given 20 days within which to amend, but [fol. 33] amended libel not being filed the action was on May 28, 1931, dismissed, at libelant's costs.

5. That during the pendency of the proceeding in admiralty court at Buffalo, the attorneys representing International Milling Company, libelant, inquired whether The Columbia Steamship Company, then owner of the Richardson would enter appearance and defend in an action to recover for said alleged damages to be brought at law (as distinguished from a proceeding in admiralty) in a court of the State of New York at Buffalo, or in Federal Court at Buffalo, and on or about February 4, 1931 the attorneys so representing International Milling Company at Buffalo were told that the Columbia Steamship Company would enter appearance and defend in an action at law brought on the alleged claim in United States District Court at Buffalo, that court having jurisdiction by reason of the

diversity of citizenship of the parties. Such action, however, was never instituted, but the next proceeding was the suit by Chance W. Clark, as assignee brought at Duluth.

Further affiant sayeth not.

Robt. G. McCreary.

Sworn to before me and subscribed in my presence this 9th day of July, 1932. Harrie S. Taylor, Notary Public. (Notarial Seal.)

[fol. 34] In District Court of St. Louis County

Affidavit of E. W. MacPherran

State of Minnesota,
County of St. Louis, ss:

E. W. MacPherran of Duluth, Minnesota, being first duly sworn, on oath deposes and says:

1. That he is an attorney at law and a member of the firm of Abbott, MacPherran, Dancer, Gilbert & Doan, attorneys-at-law, with offices at Suite 1000 Alworth Building, Duluth, Minnesota, and that affiant is personally acting as attorney for The Columbia Transportation Company in the above entitled action.

2. That affiant personally acted as attorney for The Columbia Steamship Company in an action heretofore brought by Chance W. Clark against The Columbia Steamship Company in the District Court of St. Louis County, Minnesota, and is acquainted with the said action and the cause of action therein, and all the procedure had in the District Court relative thereto.

3. That in the said action of Chance W. Clark against The Columbia Steamship Company, plaintiff attempted to make service of process upon the Captain of the Steamship Harvey D. Goulder, and served and levied writ of attachment upon the said Captain and Steamship Harvey D. Goulder on or about the 18th of August, 1931.

4. That the defendant Columbia Steamship Company in said case, appearing by affiant specially and for such [fol. 35] purpose only, moved the Court for an order set-

ting aside said purported service of summons and vacating and setting aside said writ of attachment, and that after full hearing and argument before the Court, the Court, on March 2, 1932, made and filed an Order setting aside the purported service of summons and vacating and setting aside the attachment therein, and that upon a reargument of said motion sought by plaintiff, the said Court on April 19, 1932, made and filed an Order affirming said Order of March 2, 1932, copies of which said Orders are hereto attached and made part hereof.

5. Affiant further says that the cause of action set up and included in the complaint of said case of Chance W. Clark vs. The Columbia Steamship Company, and the cause of action set up in the above entitled case of International Milling Company against The Columbia Transportation Company, were and are for the same alleged damage, grow out of the same transaction and are the same cause of action, as shown by the complaint herein and the complaint in the said Chance W. Clark case, a copy of which is attached to and made a part hereof, and that it appears by the files and proceedings in the case of the said Chance W. Clark against The Columbia Steamship Company, which are incorporated in and made a part hereof by reference, that the said plaintiff Clark was the assignee of the claim of the said International Milling Company but that the said International Milling Company entered into an agreement in writing with the said Clark whereby the said Clark agreed to remit to the International Milling Company the [fol. 36] proceeds of the said claim less the collection expenses therein, and that the said Clark was merely a nominal party to said action and that the real party in interest as plaintiff therein was The International Milling Company, the plaintiff in the above entitled action, and that the plaintiff in the said case of Chance W. Clark against The Columbia Steamship Company and the plaintiff in the above entitled case, are one and the same real parties in interest in both and each of said cases, and it further appears from the complaint, herein, that The Columbia Transportation Company is made defendant in the above entitled case for, on account and by reason as alleged in the complaint herein, of its having assumed the debts, lia-

bilities, responsibilities of The Columbia Steamship Company.

Further affiant sayeth not.

E. W. MacPherran.

Subscribed and sworn to before me, a Notary Public in and for St. Louis County, Minnesota, this 12th day of July, 1932. T. W. Doan, Notary Public, St. Louis County, Minn. My commission expires Dec. 2, 1937. (Notarial Seal.)

[fol. 37] In District Court of St. Louis County

Chance W. Clark, Plaintiff,

vs.

Columbia Steamship Company, a Corporation, Defendant

Order Vacating Attachment and Service

The above entitled matter came on for hearing at a special term of this court held October 22, 1931, upon defendant's motion to set aside and vacate the writ of attachment and the purported service and levy thereof and setting aside the purported service of summons in this action by delivering a copy thereof to Joseph S. Moran on August 18, 1931, Messrs. Abbott, MacPherran, Dancer, Gilbert & Doan, attorneys for defendant, appearing through Mr. E. W. MacPherran in support of said motion, and Messrs. Mitchell, Gillette & Carmichael, attorneys for plaintiff, appearing through Mr. H. A. Carmichael in opposition thereto. Said motion was submitted upon all the files, records and proceedings in the action, including the affidavits attached to the notice of said motion and affidavits at the time of and since said hearing submitted in support of and in opposition to said motion. The Court having duly considered said matter,

It is ordered that said motion be granted and that the writ of attachment and the purported service and levy thereof by the sheriff of St. Louis County, Minnesota, and [fol. 38] the purported service of summons in this action claimed to have been made on defendant by delivering a copy thereof to Joseph S. Moran on the 18th day of

August, 1931, be, and the same are hereby, vacated and set aside, on the ground and for the reason that said purported service and levy of attachment and purported service of summons in the main action and the prosecution of the said action in this court operate to place unreasonable conditions, burdens and restraints upon interstate commerce in violation of the provisions of Article I, Section 8, Subdivision 3 of the Constitution of the United States.

Dated at Duluth, Minnesota, February 29, 1932.

By the Court.

E. J. Kenny, Judge thereof.

You are hereby notified by this copy that the original Order was filed in this office on March 2, 1932.

J. P. Johnson, Clerk, by R. E. Johnson, Deputy.

In District Court of St. Louis County

Memorandum

Defendant's motion, which is to set aside and vacate the writ of attachment and service and levy thereof and the service of summons upon the master of the attached ship, is made on the ground that they operate to unduly burden interstate commerce in violation of the commerce clause [fol. 39] of the federal constitution. The plaintiff has not urged that the denial of similar relief by Judge Magney upon different grounds precludes the present motion, but has argued the merits of the question of the burden on interstate commerce.

The question is not technically one of jurisdiction. This court has jurisdiction of the subject matter, which is a transitory action under common law for breach of contract. Through attachment the court has jurisdiction of the defendant's property in rem, and if the service upon Moran, the master of the attached ship, is valid in so far as being a proper representative of the defendant is concerned, the court has jurisdiction of the person to proceed in personam. The Minnesota Supreme Court in Boright vs. Chicago, Rock Island & Pacific Railway Company, 180 Minn. 52, observed the distinction and treated the question as one whether a trial court with jurisdiction was required

under the commerce clause to dismiss the action or had inherent discretionary power to refuse to proceed with the trial of the action on the ground of convenience. The motion here is equivalent to a motion to quash and "motions to quash, pleas in abatement, and so forth, may be appropriate to present objections to proceeding with an action which are not strictly jurisdictional in the narrower sense of the word." 43 Harvard Law Review, 1238. The objection here urged by the defendant has been upheld by the Supreme Court of the United States when raised in substantially the same way.

The question raised by defendant's present motion was [fol. 40] last thoroughly considered by the Minnesota Supreme Court in the Boright case, supra. There the plaintiff was a citizen and resident of Kansas, defendant was a foreign railroad corporation, the cause of action was asserted under the Federal Employers Liability Act for injuries occurring in Kansas. Although a foreign corporation, the defendant had 280 miles of railroad in Minnesota, carried on both interstate and intrastate commerce in the state, and summons was served on defendant's agent in Rice County, through which its lines ran, pursuant to statute. It was pointed out that the case differed from the Davis vs. Farmers Co-operative Equity Company and the Wells cases in that in neither of them did the defendant have a railway line or do a railway business in the state where suit was brought. The judgment of dismissal entered by the lower court was reversed, it being held that it was error to refuse to try the action in Minnesota because such trial would unreasonably burden interstate commerce, and none of the other grounds of defendant's motion being sustained. Among other things our court said "that the interstate carrier has a considerable mileage and is active in the railroad business of the state is a factor in determining whether an unreasonable burden is imposed upon interstate commerce." It recognized also that the United States Supreme Court is the final authority on the question whether the prosecution of a particular action violates the commerce clause of the federal constitution. It considered that its views were supported by Hoffman vs. Missouri ex rel. Foraker, 274 U. S. 21.

[fol. 41] Four other cases decided by the Supreme Court of the United States have held that the prosecution of the

particular case under consideration had the effect of unduly burdening interstate commerce. In Davis vs. Farmers Co-operative Equity Company, 262 U. S. 312, service was made pursuant to the Minnesota statute upon a soliciting agent. Plaintiff was a non-resident, the railroad company was a foreign corporation, and had no line in Minnesota but maintained an agent in Minnesota for solicitation of business. The cause of action arose out of the state. A motion to dismiss for want of jurisdiction was made in the trial court which denied the motion and after trial entered judgment for plaintiff, which was affirmed by the State Supreme Court. Referring to the Minnesota statute providing for service of summons against a foreign railroad corporation upon a soliciting agent within the state, it was said, "As construed by the highest court of Minnesota, this statute compels every foreign interstate carrier to submit to suit there as a condition of maintaining a soliciting agent within the State. Jurisdiction is not limited to suits arising out of business transacted within Minnesota. * * * It is asserted, whatever the nature of the cause of action, wherever it may have arisen, and although the plaintiff is not, and never has been, a resident of the State * * * This condition imposes upon interstate commerce a serious and unreasonable burden which renders the statute obnoxious to the commerce clause." The judgment of the Minnesota court was therefore reversed.

[fol. 42] Atchison, Topeka & Santa Fe Railway Company vs. Wells, 265 U. S. 101, was an action in the federal courts to enjoin the enforcement of judgments rendered by a state court of Texas in an action by Wells, a citizen and resident of Colorado, against the railway company, a Kansas corporation, for injuries occurring in New Mexico. Jurisdiction was attempted to be acquired by garnishment of rolling stock in the possession of, and traffic balances due from, the garnishee. The writ of garnishment and the judgments based thereon were held void not because the rolling stock was being used in interstate commerce or the amount due on traffic balances arose out of transactions in such commerce, but because the suit necessarily and unreasonably burdened interstate commerce. It was said: "The Santa Fe is a Kansas corporation. It had not been admitted to Texas as a foreign corporation. It had not consented to be sued there. It did not own or operate any line of railroad

within the state; and had no agent there. The Texas statutes concerning garnishment were construed and applied in the Wells suit so as to permit a citizen and resident of another state to prosecute in Texas a cause of action which arose elsewhere against a railroad corporation of another state, which is engaged in interstate commerce, which neither owns nor operates a railroad in Texas, and which has not consented to be sued there. For the reasons stated in Davis vs. Farmers Co-operative Company, 262 U. S. 312, (decided since entry of the judgment here under review) such a suit necessarily and unreasonably burdens interstate commerce; and the statute as construed and applied [fol. 43] is invalid." From this case it would seem that the ground of the objection is to be treated as jurisdictional for a collateral attack against the judgment of the inferior state court was sustained.

In Michigan Central Railroad vs. Mix, 278 U. S. 492, the United States Supreme Court, on certiorari, reviewed a judgment of the Supreme Court of Missouri denying the application of the railroad company for a writ of prohibition to enjoin the judges of the lower court from trying an action against the company brought under the Federal Employers Liability Act. Plaintiff's intestate, a resident of Michigan, was killed in Michigan while employed as a switchman by the defendant railroad company, which was a Michigan corporation. Plaintiff herself shortly after his death removed to Missouri where she was appointed administratrix, and she was therefore a resident of Missouri when she commenced the action. Summons was served upon the agent in charge of the office maintained by defendant at St. Louis for the purpose of soliciting freight for transportation in interstate commerce over its lines in other states. It was pointed out that this case differed from the Davis and Wells cases only in that in each of those cases the plaintiff was a non-resident while here the plaintiff had become a resident of Missouri after the injury complained of but before instituting the action. The judgment of the state court was reversed on the ground that the trial of the action for damages in Missouri would entail a heavy burden upon, and unreasonably obstruct, interstate commerce. [fol. 44] In Denver and R. G. W. R. Co., vs. Terte, 52 Sup. Ct. Rep. 152, (decided by United States Supreme Court January 4, 1932) the Supreme Court of the United States, on certiorari, reviewed a judgment of the Supreme Court of

Missouri denying a writ of prohibition to restrain a judge of a state circuit court from entertaining jurisdiction of an action commenced by one Curtis against the petitioner and another railroad company. Curtis, then residing in Missouri, brought the action in the Missouri court against both the Santa Fe and the Rio Grande roads under the Federal Employers Liability Act to recover damages for injuries received in an accident in Colorado. The Santa Fe was a Kansas corporation but owned and operated railroad lines in Missouri as well as other states, and was licensed to do business in Missouri, and had an office and agents in that state. The Rio Grande was a Delaware corporation, not owning or operating any line in Missouri, but it did own and use some property located there and maintained one or more offices in the state and employed agents who solicited traffic, which agents engaged in transactions incident to the procurement, delivery and record of such traffic. It was not licensed to do business in Missouri. On the authority of Hoffman vs. Missouri ex rel. Foraker, supra, which was discussed by the Minnesota Supreme Court in the Boright case and referred to as supporting its conclusions in that case, it was held that the Santa Fe was properly sued in Missouri. On the authority of the Davis and Mix cases it was held that the Rio Grande was not properly sued in Missouri. It was said that prohibition against burdening [fol. 45] interstate commerce could not be avoided by the device of a joint action against the two roads nor be evaded by attaching property of the non-resident defendant, and that it is the infliction of the burden upon interstate commerce that deprives the state court of jurisdiction over cases like this.

The foregoing are all railroad cases, and the Boright action was sustained by the Minnesota court because of the fact that the defendant owned and operated lines of railway in Minnesota over which both intrastate and interstate commerce were carried. The defendant Steamship Company of course has and needs no corresponding roadbed within the state. Its ships ply the Great Lakes, and in bringing cargoes to Duluth come within the territorial jurisdiction of Minnesota. If the real objection to prosecution of suits of this character is the burden placed upon interstate commerce by reason of expense and inconvenience caused through the trial of the cause of action arising elsewhere,

with the parties and their witnesses coming from distant points, it seems rather illogical to base the right to maintain such actions upon the fact that the defendant is operating a line of railroad within the state, but such seems to be the law. The defendant is a foreign corporation organized under the laws of Ohio, with its principal place of business in Ohio, and is not qualified to do business in Minnesota. The only business which brings any of its ships to Duluth is Interstate Commerce. The cause of action arose outside of Minnesota. While it does not appear where the International Milling Company, the original owner of the alleged [fol. 46] cause of action, was incorporated or had its principal place of business, the plaintiff is a non-resident assignee so domiciled that removal to the federal courts on the ground of diversity of citizenship is impossible. It does not appear that defendant has any property or agent permanently located in Minnesota. The ship attached in this action was not attached within the boundaries of Minnesota, but the attachment has been sustained because made upon boundary waters over which the courts of Minnesota are given jurisdiction. Taking the case as a whole, it is thought that the decisions of the United States Supreme Court are authority for granting defendant's motion and setting aside the service of the process upon which jurisdiction is sought to be sustained.

Defendant's counsel places emphasis upon two federal cases, in neither of which however was the objection to jurisdiction made upon the ground that the prosecution of the action would unduly and unreasonably burden interstate commerce. The case of International Harvester Co. vs. Kentucky, 234 U. S. 579, was a criminal action in the state courts of Kentucky for alleged violation of the anti-trust laws of that state, and it was merely held that the defendant was present in the state of Kentucky so as to warrant the service of process which was made upon its representative there, even though the business of the company was wholly of an interstate character. In Davis vs. Cleveland C. C. & St. L. Ry., 217 U. S. 157, the facts were very similar to those in subsequent cases heretofore cited. The opinion states that the case presented a question of jurisdiction [fol. 47] arising from the levy in attachment proceedings on freight cars alleged to have been engaged, when attached, in interstate commerce, and it was held that the attachment

was not void, but the question of whether the prosecution of the action unduly burdened interstate commerce was not raised or decided. It is significant that this case is cited in Atchison Ry. Co. vs. Wells in the following statement:

"The rolling stock held by the garnishee was then being used in interstate commerce and the amount due on traffic balances arose out of transactions in such commerce. These facts did not render the property immune from seizure by attachment or garnishment. Davis vs. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., 217 U. S. 157. But the writ of garnishment is void because of the purpose for which it was invoked."

An interesting discussion of this whole question is contained in an article entitled "Place of Trial in Civil Actions" published in 43 Harvard Law Review, 1217, from which an excerpt has already been quoted in this memorandum.

[fol. 48] In District Court of St. Louis County

Chance W. Clark, Plaintiff,

vs.

Columbia Steamship Company, a Corporation, Defendant

Order Affirming Former Order

Plaintiff having petitioned for reargument upon defendant's motion to set aside and vacate the writ of attachment herein and to set aside the purported service of summons by delivery of a copy thereof to one Joseph S. Moran on August 18, 1931, and said petition having been granted and said reargument had on March 12, 1932.

It is ordered that the order heretofore made dated February 29 and filed March 2, 1932, granting defendant's said motion and setting aside and vacating said writ of attachment and service of summons be adhered to and affirmed with the same effect as when filed.

Dated at Duluth, Minn., April 19, 1932.

By the Court.

E. J. Kenny, Judge thereof.

You are hereby notified by this copy that the original Order was filed in this office on Apr. 19, 1932.

J. P. Johnson, Clerk, by B. G. Rilling, Deputy.

[fol. 49] IN DISTRICT COURT OF ST. LOUIS COUNTY

MEMORANDUM

Upon the reargument, which was had at plaintiff's request, his counsel took exception to the statement in the memorandum attached to the order in question that "The plaintiff has not urged that the denial of similar relief by Judge Magney upon different grounds precludes the present motion, but has argued the merits of the question of the burden on interstate commerce." Possibly there was some misunderstanding of counsel's position upon this, and the court is glad to consider now the point made concerning the effect of Judge Magney's order denying defendant's motion for the same relief but upon the ground that the attachment was made beyond the territorial jurisdiction of the Minnesota courts and upon the ground that Moran was not such a representative of the defendant that service could be made upon him. The second motion was made upon entirely different grounds and nothing has been pointed out to show that the court could not entertain the second motion. Counsel quotes a portion of a court rule claimed to be applicable. The rule referred to is Rule 10 of the last revision of District Court Rules, and reads as follows:

"Ex Parte Order. No order shall be made ex parte unless there shall be presented with the application therefor an affidavit showing whether any previous application has been made for the order requested, or for a similar order; and if there has been a previous application, to what court or judge it was made, and the determination [fol. 50] made thereof, and what new facts, if any, are shown upon such subsequent application that were not previously shown. For a failure to comply with the provisions of this rule, the order made on such subsequent application may be vacated."

The old rule quoted by counsel would be inapplicable in any event, because no application to another judge for an order to show cause or any ex parte order had been refused. The only other application for an order to show cause, made to Judge Magney, had been granted. It was the motion itself which had been subsequently denied; but

be that as it may, the facts and circumstances concerning the making and hearing of the motion and the disposition thereof were all fully stated and explained by Mr. MacPherran when he applied for the new order to show cause. They were not made to appear by affidavit as the rule requires, but the merits of the second motion appeared from the record including the affidavits accompanying the notice of the second motion. Pertinent is the following language from Unowsky vs. Show, 161 Minn. 489, concerning a motion to vacate a default judgment and for leave to answer:

"But it is said that there was no affidavit of merits. The statute requires none. The court rule making such requirement may be waived if the merits appear from the record as they do here."

It is now urged for the first time that at the time the second motion was made the defendant was in default of [fol. 51] answer and that its right to move to set aside the attachment had expired under Section 9350 Mason's Minnesota Statutes. The court is of the opinion that that statute does not control or limit a defendant's right to have an attachment vacated and set aside upon the ground that the court is without jurisdiction to entertain the prosecution of the action, or in such a situation as we have here. Atchison Railway Co. vs. Wells, 265 U. S. 101, was an independent suit in the federal court to enjoin the enforcement of judgments in the state court based upon garnishment.

"Relief against the void judgments entered was properly sought by the Santa Fe in the federal court. * * * The garnishment was void because seizure of the rolling stock and credits for the purpose of compelling the Santa Fe to submit to the jurisdiction of the court in the Wells suit interfered unreasonably with interstate commerce."

An additional affidavit was filed on behalf of plaintiff showing that plaintiff's assignor, International Milling Company, had its office and principal place of business in Minneapolis, Minnesota, and that the assignment of the cause of action to plaintiff was made under an agreement

by the assignee to remit the proceeds of the claim less collection expenses to such assignor. It does not appear from such affidavit or from the complaint where the International Milling Company was incorporated. Under the cases of Michigan Central Ry. vs. Mix, 278 U. S. 492, and Denver [fol. 52] & R. G. W. R. vs. Terte, 52 Supreme Court Reporter, 152, it probably would not make any difference if the International Milling Company itself were plaintiff. The affidavit adds force to the suggestion that the assignment of the cause of action was made merely for the purpose of preventing removal of the case to the federal court. Under those circumstances no strained effort should be made to hold that the prosecution of the action would not result in an undue burden upon interstate commerce in order to keep the action in the Minnesota state courts for trial.

The remainder of plaintiff's reargument does not present anything new. It is insisted that the record shows that the defendant was doing business in Minnesota. Under the case of Boright vs. Railway Co., 180 Minn. 52, the extent to which the defendant is doing business in this state is a factor to be considered in determining whether an unreasonable burden is imposed upon interstate commerce, but the decisive question is not whether the defendant is doing business in the state or is present in the state so as to warrant service of process upon it. This is clear from an opinion of the United States District Court for the Southern District of New York, Panstwowe Zaklady Graviozne vs. Automobile Ins. Co., 36 Fed. Rep. (2nd Series) 504, an opinion written by Judge Thacker, now Solicitor General of the United States, which also disposes of plaintiff's contention that defendant by giving a bond to release the judgment or in some other way made a general appearance which now precludes this motion.

[fol. 53] "The fact that the defendant railroad company is engaged in business in the state, and by doing business here, has consented to be sued here, is no basis for the assertion of jurisdiction of actions by nonresidents which arise in other states and which are entirely disconnected with the business it does here. * * * Nor was the objection to the exercise of such jurisdiction waived by the appearance of the defendant, because the jurisdictional ob-

jection is to the subject-matter, namely, that the cause of action arose in another state, between nonresidents of the forum, and cannot be tried here without imposing unreasonable burdens upon interstate commerce. Jurisdiction of the subject of action may be challenged after general appearance."

The court was in some doubt as to the form of order that should now be made adhering to the ruling formerly made. There was no motion to vacate the order filed March 2nd. It has been thought best simply to order that that order be adhered to and affirmed.

[fol. 54] In District Court of St. Louis County

Chance W. Clark, Plaintiff,

vs.

Columbia Steamship Company, a Corporation, Defendant

Complaint

Comes now the above named plaintiff, and for a cause of action against the above named defendant, alleges:

1. That during all of the times herein stated the defendant has been and still is a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, and at all times hereinafter mentioned, the defendant owned and operated a certain vessel or steamer known as "W. C. Richardson", and it was then engaged in the business of transporting merchandise or property in said vessel between ports on the Great Lakes.

2. That during all of the times herein stated the plaintiff has been and still is a citizen and resident of the said State of Ohio.

3. That during all of the times herein stated the International Milling Company, hereinafter referred to as "the shipper", was engaged in the business of buying, selling and shipping grain.

4. That on or about and from December 28, 1929, to January 2nd, 1930, at South Chicago, Illinois, the shipper,

[fol. 55] through its agents, Bartlett, Frazer & Company, delivered to defendant 179,030.50 bushels of No. 2 Hard Wheat, and 64,977.30 bushels of No. 1 Northern Spring Wheat on board said defendant's Steamer "W. C. Richardson" for storage at Chicago in said steamer until on or about May 1, 1930, and then for transportation to Buffalo, New York, and for a valuable consideration duly paid by said shipper to defendant, defendant then agreed to store and later promptly transport said wheat on said vessel to Buffalo, New York, and deliver the same in like good order and condition as received, the dangers of navigation, fire and collision excepted; that said wheat was in good order and condition when delivered to defendant. That said wheat was consigned to shipper, International Milling Company.

5. That pursuant to said agreement, the defendant stored said wheat at South Chicago, Illinois, in said Steamer "W. C. Richardson" and later transported said wheat to Buffalo, New York, where said vessel arrived on or about May 7, 1930, when defendant delivered said wheat to shipper, said wheat, however, not being in the same good order and condition in which it had been delivered to defendant, but that the same had become wet, damp and heated, causing some of the wheat to become sprouted, spoiled and damaged while under the care and control of defendant; that approximately 65,242.43 bushels of said wheat were in a badly spoiled and damaged condition; that the damage and injury sustained by said wheat was not caused by dangers of navigation, or of fire, or of collision, [fol. 56] but was caused by the defendant negligently permitting said wheat to become wet, damp and heated, thereby sprouting, spoiling and damaging the same.

6. That the shipper is engaged in the business of milling wheat and buying and selling wheat, and the shipper intended to either mill said wheat at Buffalo, New York, or to sell the same; that when said wheat was delivered to defendant it was in good order and condition for sale, but when removed from said vessel at Buffalo for redelivery to the shipper, a large portion of it was badly spoiled and damaged, but if properly handled and treated could be put in condition for sale; that after said wheat had been unloaded in elevators at Buffalo, shipper took the damaged

wheat and had it treated and handled, by agreement of all parties concerned, for the purpose of treating and putting it in the best possible condition, which was done at the expense of shipper of $3,789.78, and the incurring of such expense was necessary in order to lessen the damage to said wheat; that said 65,242.43 bushels of wheat were reconditioned, and after reconditioning weighed 63,163.20 bushels, making a loss in shrinkage and damage to shipper of 2,079.23 bushels, that were reasonably worth $2,315.54; that in addition thereto, shipper had certain other necessary expenses, which expenses were necessary in order to lessen the damage to said wheat, consisting of shoveling, $13.45, separating, $42.75, towing, $86.28, inspection, $82.10, weighing, $51.28, shovels, $5.76, and reloading, $38.42; that said 65,242.43 bushels of wheat were reconditioned, and in reconditioning were separated into two lots—one lot consisting of 27,720 bushels, and the second lot, 35,443.20 [fol. 57] bushels; that after the reconditioning, Lot 1 did not grade, and it was necessary to dispose thereof by sample, and Lot 2 graded No. 3 Northern Spring Wheat.

7. That the market price and the reasonable value of No. 1 Northern Spring Wheat was at Buffalo, New York, on May 7, 1930, $1.11⅜ per bushel.

8. That Lot 1, after reconditioning, was offered for sale to the highest bidder, and on May 28, 1930, was sold for eighty-four cents ($.84) per bushel, which was the reasonable value thereof, whereby the shipper sustained a loss of $7,587.25, being the difference in value of said wheat in the condition in which it was delivered to defendant, and the reasonable value of the same in the condition in which it was redelivered to shipper; that Lot 2, grading No. 3 Northern Spring Wheat, was sold by the shipper after it was reconditioned, and as speedily as possible, on May 28, 1930, for ninety-six cents ($.96) per bushel, whereby the shipper sustained a loss in amount of $5,250.19, being the difference in value of said wheat in the condition in which it was delivered to defendant, and the reasonable value of the same in the condition in which it was redelivered to shipper, making a total amount of damage sustained by shipper in the sum of $19,262.89.

9. That thereafter, and before the commencement of this action, to-wit, on July 9, 1931, for a valuable consideration,

the shipper did duly assign to plaintiff said claims against the defendant on account of the breach of said contract, [fol. 58] and ever since such assignment, plaintiff has been and now is the owner of said claims.

Wherefore, Plaintiff demands judgment against defendant for the sum of $19,262.80, with interest thereon at the rate of six per cent (6%) per annum from May 7, 1930, together with the costs and disbursements of this action.

Mitchell, Gillette & Carmichael, Attorneys for Plaintiff, 1200 Alworth Building, Duluth, Minnesota.

In District Court of St. Louis County.

Affidavit of H. A. Carmichael

State of Minnesota,
County of St. Louis, ss:

H. A. Carmichael, being first duly sworn, according to law, deposes and says:

That the defendant, The Columbia Transportation Company, and formerly the Columbia Steamship Company, owns and operates the following vessels:

Str. Frantz, J. H.
Str. Goulder, H. D.
Str. Hanna, Jr., H. M.
Str. Hubbard, C. Russell.
[fol. 59] Str. Livingstone, Wm.
Str. Miller, L. B.
Str. Norton, D. Z.
Str. Richardson, W. C.
Str. Stifel, W. F.
Str. Topping, John A.

That among the vessels is the Steamer "W. C. Richardson", which carried the cargo of wheat involved in this action.

That according to the affidavit of L. M. Leonard, upon which the Order to Show Cause issued herein in part was based, the following is stated, in paragraph 10 thereof:

"* * * and that since that time The Columbia Transportation Company has been engaged in interstate

and foreign commerce in the same manner and under the same conditions as hereinbefore set forth with respect to the business of The Columbia Steamship Company."

A portion of this affidavit will refer to the actions of the Columbia Steamship Company, there to be treated with the same force and effect as though the transactions were had by the Columbia Transportation Company.

That The Columbia Transportation Company is transacting business in the State of Minnesota, and the Columbia Steamship Company transacted business in the State of Minnesota, in that it shipped cargoes of grain from Duluth and Superior, for which a bill of lading was issued [fol. 60] at Duluth by Messrs. Boland & Cornelius, Agents, by F. P. Houghton, who has an office in the Board of Trade Building in Duluth and resides in Duluth, and issued the bills of lading at Duluth. That in the year 1929 two cargoes of grain, upon which bills of lading were issued as herein set forth, were transported, and in the year 1930 four cargoes of grain, upon which bills of lading were so issued, were transported. That a true and correct copy of bill of lading issued November 24, 1930 is attached hereto, and similar bills of lading were issued on all other cargoes herein set forth. That said bills of lading were issued at Duluth, Minnesota, by Boland & Cornelius, Agents for Columbia Steamship Company, and signed by F. P. Houghton, a resident of Duluth. A copy of the bill of lading is set forth, marked Exhibit "A". That this bill of lading was on the Steamer "W. C. Richardson", which is the identical steamer involved in this section, for transporting a cargo of grain from South Chicago to Buffalo.

That said Steamship Company transports many cargoes or ore from the Missabe Ore Docks at Duluth, and on each cargo of ore transported by it the Master of the vessel signs a bill of lading. That there is herein set forth, marked Exhibit "B" and attached hereto, a true and correct copy of a bill of lading issued by E. Andreas of the Steamer "Wm. F. Stifel" on November 12, 1930. That this bill of lading was signed by E. Andreas at the dock office of the Missabe Docks at Duluth.

That the Steamer "Wm. F. Stifel" is a steamer which was owned and operated by the Columbia Steamship Com-

[fol. 61] pany, and is now owned by the defendant The Columbia Transportation Company.

That the bills of lading for grain and the bills of lading for iron ore are shipping contracts entered into between the defendant or its predecessor and the parties interested in the grain or ore at Duluth, Minnesota, and are the only contracts evidencing said transactions.

That affiant is informed and believes, and alleges the fact to be, that The Columbia Transportation Company and its predecessor, the Columbia Steamship Company, transacted more business at the port of Duluth than at any other ports on the Great Lakes.

Mr. L. M. Leonard, in his supporting affidavit, upon which the Order to Show Cause was issued herein, states in paragraph 9:

"That during the years and navigation seasons of 1929, 1930 and 1931, said corporation, The Columbia Steamship Company owned and operated a fleet of lake freight steamers, ten in number, among said steamers being the W. C. Richardson; that none of said steamers were common carriers, but all were engaged as private carriers in the transportation of bulk freight on the Great Lakes, *exclusively* in interstate commerce or in commerce between a state of the United States and a province of the Dominion of Canada."

We think Mr. Leonard is mistaken in his affidavit, as a contract entered into between the plaintiff and the defendant in this case was as follows:

[fol. 62] "December 13, 1929.

"We confirm charter with you today of about 250,000 bushels of wheat to be moved from South Chicago to Buffalo, N. Y. Steamer W. C. Richardson. Due to load about Dec. 20. Rate Four (4) cents per bushel.

Remarks: This charter is for the account of the Columbia Steamship Company, Cleveland, Ohio, owner of the Steamer W. C. Richardson.

It is understood the rate includes winter storage at Chicago, spring delivery at Buffalo, N. Y., the shipper to guarantee space in the elevator to unload the cargo when the ship arrives at Buffalo. The ship agrees to sail promptly after the opening of navigation, as soon as the owners deem it safe to sell.

One-half of freight to be payable when ship is loaded, balance when the vessel is discharged in the spring. Shipper has option of discharging the ship at South Chicago on or before April 1st, 1930, in which case the freight is to be two cents per bushel net to the ship free of all unloading costs, ship to deliver the cargo alongside an elevator.

D. Sullivan & Co., Agents. (Signed) A. C. Sullivan.

Bartlett Frazier Co., 111 W. Jackson Blvd., Chicago, Illinois."

The wheat was loaded on this vessel, the "W. C. Richardson", on December 30th and 31st, 1929, and January 2nd, 1930, and the shipment commenced on May 3rd, 1930; [fol. 63] that is, for four months the vessel acted in the capacity of a storage warehouse in the port of Chicago, with leave granted to the shipper to unload the cargo. This was a wholly intrastate transaction. See the case of Cargill Grain Company v. Cleveland-Cliffs Steamship, 182 Minn. 516, 528, where it is said:

"We agree with the trial court that the Harter act did not apply until the voyage commenced. The damage here occurred before that and during the period of winter storage."

Affiant notes from the affiadvit of Otto Gentz, being one of the affidavits attached to the Order to Show Cause, that he states:

"that at no time was said steamer C. Russell Hubbard in Minnesota or Minnesota waters."

Affiant believes Otto Gentz to be mistaken in this regard. Article II., Section 1, of the Wisconsin Constitution, says, reading from the center of the section, concerning the boundary of the state:

"Thence down the main channel of the Montreal River to the middle of Lake Superior; thence through the center of Lake Superior to the mouth of the St. Louis River; thence up the main channel of said river to the first rapids in the same above the Indian village, according to Nicollet's map."

The Minnesota Constitution, Article II., Section 1, reads as follows:

[fol. 64] "Thence down the said river to and through Lake Superior, on the boundary line of Wisconsin and Michigan, until it intersects the dividing line between the United States and the British possessions."

By Section 2 of Article II. of the Constitution of the State of Minnesota, there is provided the jurisdiction on boundary waters. It reads as follows:

"The state of Minnesota shall have concurrent jurisdiction on the Mississippi and all other rivers and waters bordering on the said state of Minnesota, so far as the same shall form a common boundary to said state, and any other state or states now or hereafter to be formed by the same; and said rivers and waters, and navigable waters leading into the same, shall be common highways and forever free, as well to the inhabitants of said state as to other citizens of the United States, without any tax, duty, impost, or toll, therefor."

To analyze these provisions, Minnesota has concurrent jurisdiction with Wisconsin of the waters of Lake Superior embraced from the western shores of Lake Superior to a line running from the Pigeon River to the Montreal River, that is, the eastern boundary of the State of Wisconsin; and in addition thereto, Otto Gentz sailed his ship through these waters into the mouth of the St. Louis River, proceeded to a dock at Allouez, and thence, in his own language:

"That thereafter she proceeded to the Pittsburgh Coal Company Dock No. 7, located at Duluth, Minnesota, to dis-[fol. 65] charge the remainder of her cargo."

It seems that Otto Gentz must have been misinformed when he signed the typed affidavit, which was apparently dictated by one of the attorneys in this case. In other words, the vessel attached in this case proceeded about ninety miles through waters over which the State of Minnesota and the State of Wisconsin had concurrent jurisdiction.

There is attached to the moving papers in this case, upon which the Court made its Order to Show Cause, the affidavit of E. W. MacPherran, which in paragraph 5, among other things states the following:

"* * * that the said plaintiff Clark was the assignee of the claim of the said International Milling Company but that the said International Milling Company entered into an agreement in writing with the said Clark whereby the said Clark agreed to remit to the International Milling Company the proceeds of the said claim less the collection expenses therein, and that the said Clark was merely a nominal party to said action and that the real party in interest as plaintiff therein was The International Milling Company, the plaintiff in the above entitled action, and that the plaintiff in the said case of Chance W. Clark against The Columbia Steamship Company and the plaintiff in the above entitled case, are one and the same real parties in interest in both and each of said cases, and it further appears from the complaint herein, that The Columbia Transportation Company is made defendant in the above entitled case for, [fol. 66] on account and by reason as alleged in the complaint herein, of its having assumed the debts, liabilities, responsibilities of The Columbia Steamship Company."

Affiant wishes to call attention to the fact that in the memorandum filed by Judge Kenny on February 29th, 1932, the following is stated:

"The cause of action arose outside of Minnesota. While it does not appear where the International Milling Company, the original owner of the alleged cause of action, was incorporated or had its principal place of business, the plaintiff is a non-resident assignee so domiciled that removal to the federal courts on the ground of diversity of citizenship is impossible."

And in his memorandum filed on April 19, 1932, he stated the following:

"The affidavit adds force to the suggestion that the assignment of the cause of action was made merely for the purpose of preventing removal of the case to the federal court. Under those circumstances no strained effort should be made to hold that the prosecution of the action would not result in an undue burden upon interstate commerce in order to keep the action in the Minnesota state courts for trial."

Affiant believes that Judge Kenny would have made a different order if the International Milling Company itself had been plaintiff. He so indicated on the argument.

Affiant believes that Judge Kenny ignored the rule laid down in the case of Boright v. Chicago, Rock Island & [fol. 67] Pacific Railway Company, 180 Minn. 52, on the grounds that in the Boright case the railroad operated on tracks in the State of Minnesota, and the steamboat, while operating within Minnesota, did not have to operate on tracks.

Affiant also states the fact to be that Judge Kenny ignored the rule laid down in the case of Iriquois Transportation Company v. De Laney Forge & Iron Company, 205 U. S. 354, and made no reference to it in the memorandums filed by him, and did not in any way attempt to distinguish it.

Affiant is also of the opinion that Judge Kenny ignored the rule that bills of lading are the only contracts covering a shipment, and in this case they were executed at Duluth by an agent, and Judge Kenny, without in any way referring to the rule in the memorandums filed by him, has held that those agents, executing the bills of lading executed at Duluth, were not doing business within the State of Minnesota.

Affiant is informed and believes that the Columbia Steamship Company formerly, and The Columbia Transportation Company does now, solicit business in the State of Minnesota, consisting of grain cargoes, and it does make contracts of shipments in the State of Minnesota in the manner of bills of lading for cargoes transported from the port of Duluth and Two Harbors. That affiant is informed and believes that the Columbia Steamship Company formerly, and The Columbia Transportation Company now, has agents within the State of Minnesota soliciting business [fol. 68] and doing other things for it.

Replying to paragraph 6 of Mr. Leonard's affidavit, affiant states that he has charge of this litigation for the plaintiff. That the main place of business of the plaintiff is Minnesota, and certain members of the plaintiff's office force, living at Minneapolis, Minnesota, will be witnesses in this case, and the city of Duluth, Minnesota, will be as convenient a place to try this case as any other place.

Replying to paragraph 7 of Mr. Leonard's affidavit, af-

fiant states that Otto Gentz, on July 1st, 1932, was the Captain of the Steamer "C. Russell Hubbard". That he had under his control the crew of said vessel, which consisted of twenty-seven to thirty-two men; that said vessel moved into the Duluth-Superior Harbor under its own steam and in charge of said crew, and Otto Gentz was the managing agent of defendant at the time process was served on him.

Replying to paragraph numbered 8 of Mr. Leonard's affidavit, affiant states that during the years 1929, 1930 and 1931 the Columbia Steamship Company, without maintaining an office in Minnesota, transacted business in Minnesota by issuing bills of lading.

Replying to paragraph numbered 10 of Mr. Leonard's affidavit, affiant is informed and believes that the Columbia Steamship Company did solicit business, consisting of grain cargoes, in the State of Minnesota in the years 1929 and 1930.

Replying to paragraphs 4 and 5 of Robert G. McCreary's affidavit, affiant states that the United States Court in Ad- [fol. 69] miralty would not have jurisdiction of this claim because it was a storage claim or warehousing claim, and not within the admiralty jurisdiction, and therefore the decree was entered and judgment satisfied against this plaintiff on the 18th day of May, 1931. A copy of the satisfaction is hereby quoted:

"Satisfaction of a decree and judgment in this Court in favor of the Columbia Steamship Company against International Milling Company, for the sum of Four Hundred Twelve Dollars and Twenty Cents ($412.20), is hereby acknowledged. Judgment entered on the docket of the Clerk of the District Court of the United States for the Western District of New York, the 18th day of May, 1931."

Replying to paragraph 5 of Mr. MacPherran's affidavit, wherein he said:

"* * * that the said plaintiff Clark was the assignor of the claim of the said International Milling Company but that the said International Milling Company entered into an agreement in writing with the said Clark whereby the said Clark agreed to remit to the International Milling Company the proceeds of the said claim less the collection expenses therein, and that the said Clark was merely a

nominal party to said action and that the real party in interest as plaintiff therein was the International Milling Company, the plaintiff in the above entitled action, and that the plaintiff in the said case of Chance W. Clark against The Columbia Steamship Company and the plaintiff in the [fol. 70] above entitled case, are one and the same real parties in interest in both and each of said cases."

Affiant calls attention to the rule announced in the case of Hayday v. Hammermill Paper Company, 176 Minn. 315, wherein the first paragraph of the syllabus says:

"* * * the assignee being, under controlling authority, the real party in interest."

And affiant calls attention to the fact that in Judge Kenny's second memorandum, filed herein on April 19, 1932, on page 3, he refused to consider that the International Milling Company itself was the real party in interest, wherein he said:

"An additional affidavit was filed on behalf of plaintiff showing that plaintiff's assignor, International Milling Company, had its office and principal place of business in Minneapolis, Minnesota, and that the assignment of the cause of action to plaintiff was made under an agreement by the assignee to remit the proceeds of the claim less collection expenses to such assignor. It does not appear from such affidavit or from the complaint where the International Milling Company was incorporated. Under the cases of Michigan Central Ry. vs. Mix, 278 U. S. 492, and Denver & R. G. W. R. vs. Terte, 52 Supreme Court Reporter, 152, it probably would not make any difference if the International Milling Company itself were plaintiff. The affidavit adds force to the suggestion that the assignment of the cause of action was made merely for the purpose of preventing [fol. 71] removal of the case to the federal court. Under those circumstances no strained effort should be made to hold that the prosecution of the action would not result in an undue burden upon interstate commerce in order to keep the action in the Minnesota state courts for trial."

H. A. Carmichael.

Subscribed and sworn to before me this 21st day of July, 1932. Edith Sundholm, Notary Public, St. Louis County, Minn. My commission expires Sept. 16, 1938. (Notarial Seal.)

EXHIBIT "A" TO AFFIDAVIT OF H. A. CARMICHAEL

Lake Grain Bill of Lading

No. —

Duluth, Minn., Nov. 24th, 1930.

Shipped, in apparent good order and condition by Cargill Elevator Company, as agents and forwarders, for account and risk of whom it may concern, on board the Steamer W. C. Richardson, whereof —— —— is master, now in the port of Duluth-Superior and bound for Buffalo, N. Y.

The following property as herein described, shippers' weight (weight, quality and value unknown to the undersigned), to be delivered in like good order and condition (the dangers of navigation, fire and collision excepted), as consigned herein or to his or their assigns or assignees [fol. 72] upon paying the freight and charges as noted below. The carrier shall make no claim for any overrun in the out-turn of cargo and assumes no responsibility for shortage or for differences in weights caused by natural shrinkage or discrepancies in elevator weights, but the carrier shall allow a fixed amount of one-quarter bushel per thousand bushels as tare, the same to be deducted from the freight at market price, port of destination, on day of unloading. All grain on board is to be delivered and freight is to be collected upon out-turn weight. Where two or more shipments are carried in the same compartment of the vessel, the shortage, if any, resulting from unloading the last of these, shall be borne pro rata by the shippers.

If the owner of the ship shall have exercised due diligence to make said ship in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in the navigation or management of the ship, or from latent or other defects, or unseaworthiness of the ship, whether existing at time of loading or at the beginning of the voyage, but not discoverable by due diligence, the ship-owner shall not be liable for loss or damage to cargo, and the consignees or owners of the cargo shall not be exempted from liability for contribution in General Average, or for any special charges incurred, but with the ship-owner, shall contribute in General Average, and shall pay such special charges as if such danger, dam-

age or disaster had not resulted from such fault, negligence, latent or other defects or unseaworthiness.

[fol. 73] Permission given to tow and be towed, and for reasonable deviation for that purpose.

In witness whereof, the agents of the said vessel have affirmed to one Bill of Lading and copies thereof, the Original Bill of Lading being alone negotiable, and the said copies marked on their face as follows: "Copy—Not Negotiable."

Order of Cargill Grain Co., Inc.,
Care of Cargill Grain Co., Inc., Buffalo, N. Y.
Notify Cargill Grain Co., Inc., Buffalo, N. Y.

Original

90,000 Bushels of Oats

Freight from Duluth-Superior to Buffalo, N. Y. being — cents per bushel of Thirty-two (32) pounds. Payable by shipper at Duluth.

Grain loaded Hold No. 2.

Boland & Cornelius, Agents, by F. P. Houghton.

Exhibit "B" to Affidavit of H. A. Carmichael

Copy

S. S. Bill of Lading

No. 1428

This memorandum is not a bill of lading, but is a copy, and is intended solely for filing or record

Duluth, Minn., Nov. 12, 1930.

Received, in good order and well conditioned, from the Ore Docks of the Duluth, Missabe & Northern Railway, for the account and at the sole risk of whom it may concern, [fol. 74] and on board the Steamer called the Wm. F. Stifel whereof E. Andreas is Master, now in the Port of Duluth, Minnesota, and bound for Cleveland, Ohio, the certain property hereinafter described, to be forwarded and delivered in like good order and condition (the dangers

of navigation, fire, explosion and collision excepted) as stated and addressed in the margin hereof, or to its his or their assigns or consignees, only upon receipt of the freight and charges thereon noted below.

In witness whereof, the master or other authorized officer or agent of said vessel has hereby affirmed to this bill of lading, marked "Original", and has signed one copy as a master's receipt, so marked on its face, and 10 other copies hereof have been made, of which one is certified to by the agent of the Ore Dock.

	Iron ore		R. R. Weight	
— Tons — Group Three in hatches—				
614.	Morris Day	Group Three		
2296	Rust	"	2819	1440
80	Sellers	"	81	660
532	Hartley Burt	"	536	1360
1355	Minnewas Lease 219	"	1368	1180
1819	Missabe Mountain	"	1837	1420
Railroad Freight Charges at 91 cents per Ton		$6155.41		
Total Cargo 6696 (Gross Tons)				
Total R. R. Weight			6764	440
Vessel's freight				

[fol. 75] Consignee: Pittsburgh S. S. Co., Cleveland, Ohio.

With privilege of changing destination to any Lower Lake Port by notice in transit.

Reported 3.00 P. M. 11/12/30.
Ready to Load 3.00 P. M. 11/12/30.
Commenced Loading 3.00 P. M. 11/12/30.
Finished Loading 5.30 P. M. 11/12/30.
Draft of Water: Forward 18.7, Mid. 18.10, Aft 19.0.
Unavoidable Detention 30 Min. Shifting.

E. Andreas, Master.

Master's Receipt—Not a Bill of Lading.
Vessel Contract —.

IN DISTRICT COURT OF ST. LOUIS COUNTY

Case No. 69993

Statement of Evidence

The above entitled matter came on for hearing on motion, at the Court House, in the City of Duluth, Minnesota, on the 22nd day of July, 1932, before the Honorable C. R. Magney, Judge presiding.

[fol. 76] Mr. H. A. Carmichael and Mr. Donald D. Harries, of Mitchell, Gillette & Carmichael, appeared on behalf of the plaintiff; and Mr. E. W. MacPherran, of Abbott, MacPherran, Dancer, Gilbert & Doan, appeared on behalf of the defendant.

The following is a transcript of the testimony taken upon said hearing:

Mr. Carmichael: We would like to call Sidney Wick to the stand. I will say to the Court that we were unable to get Mr. Wick's affidavit for the purpose which will appear and I consider his testimony important in this regard.

The Court: Any objection, Mr. MacPherran?

Mr. MacPherran: Yes, we object. Mr. Wick has been in town here for a considerable length of time and counsel has had an opportunity to see him and to get from him any information which can properly be submitted here in the form of an affidavit and these proceedings are customarily submitted upon affidavits, and while it is discretionary with the Court, of course, to proceed with the matter, at the same time it does seem to me that, such opportunity to secure his affidavit having been had, this witness should not be permitted to testify at the present time.

Mr. Carmichael: This witness is in the employ of the defendant.

Mr. MacPherran: Well, that is a debatable question.

Mr. Carmichael: Well, that is the position he takes.

[fol. 77] The Court: You mean he has refused to give you an affidavit.

Mr. Carmichael: Yes. I can make my affidavit as to what I think he will say, but——

The Court: Well, it is somewhat irregular, but I think you may call him.

Mr. Carmichael: Mr. Wick.

Mr. MacPherran: Note an exception.

SIDNEY WICK, called as a witness on behalf of *of* the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Carmichael:

A. Your name is Sidney Wick?

A. Correct.

Q. And you are associated in the transportation brokerage business with Kenneth A. Scott & Company?

A. That is right.

Q. Where is your office in Duluth?

A. 703 Board of Trade.

Q. And you live in Duluth?

A. Yes, sir.

Q. Have you had any dealings with the Columbia Steamship Company or the Columbia Transportation Company?

Mr. MacPherran: Object to the form of the question as to the Columbia Steamship Company, they being not a party to this case.

The Court: Objection sustained.

Mr. Carmichael: May it please the Court, I wish to call attention to the fact that in Mr. Leonard's supporting [fol. 78] affidavit, one of the affidavits upon which the order to show cause was issued in this case, in Paragraph 10, he says, "and that since that time the Columbia Transportation Company has been engaged in interstate and foreign commerce in the same manner and under the same conditions as hereinbefore set forth with respect to the business of the Columbia Steamship Company." The Columbia Transportation Company was organized and took over this business on December 28th, last year, and to show the business, the same character of business, we have got to go into the relationship of the Columbia Steamship Company and the Columbia Transportation Company and it is based on his affidavit, and if this service would be good, under the facts existing, for the Columbia Steamship Company, it is good, under the facts, for the Columbia Transportation Company.

The Court: Well, of course, I am at sea right now as to just what you are driving at and it is rather difficult for me to know how to rule.

Mr. MacPherran: Now, this is a bit informal, but just in the way of informing the Court, and if I go wrong just tell me. This case is a case in which there is a claim of damage alleged by the plaintiff to certain merchandise that was delivered to a boat, the "Richardson", of the Columbia Steamship Company in 1930. It was to be held in winter storage and thereafter delivered by the "Richardson" at Buffalo. When the grain was delivered at Buffalo the International Milling Company, the plaintiff in this case, [fol. 79] claims that the grain was damaged. Now, without going any further into certain details which I may enlarge upon later, a suit was brought by Chance W. Clark, assignee of the International Milling Company, in this court against the Columbia Steamship Company and a summons was issued and a writ of attachment was issued. The summons was attempted to be served upon the captain of a vessel, the "Goulder", owned by the Columbia Steamship Company. This was last August. And an attachment was levied upon the vessel, they both being, as the Court will recollect, at Allouez, Wisconsin. It is possibly unnecessary to say that a bond was filed and the boat was released and the question of the vacation of the attachment and the setting aside of the service of the summons was litigated in this court. Now, the Columbia Steamship Company transferred all of its property, including the present vessel which is the subject matter of this attachment, to the Columbia Transportation Company, and I think from December, 1931, or about that, this vessel which is now the subject of the attachment in this case has been owned by the Columbia Transportation Company. In this present suit a process was issued, a summons was issued and a writ of attachment was issued, and they, in similar circumstances, were served upon the captain of the "Hubbard" on July 1, 1932, and an attachment was levied upon the "Hubbard" and bond was filed. Now, it seems to me that, at the present time, the question of the service depends entirely upon the business engaged in by the Columbia Transportation Company,—not the Columbia Steamship Company. I do not want to go into argument; [fol. 80] I just want to state the facts. This boat was—I think I can state this without you questioning it——

Mr. Carmichael: Go ahead.

Mr. MacPherran: This boat was, at the time of the service and the levy, engaged in discharging interstate cargo. Now, it does seem to me that at the present time it does not matter what business the Columbia Steamship Company was engaged in in 1928 and 1930 or up to the time that they disposed of their property in 1931. The question here is as to the validity of the service of the process and the validity of the attachment served upon the property of the defendant in this case at this time; that is, as of July 1, 1932. Now, I don't know whether that clears up the situation in the Court's mind or not, but that is the situation as I understand it.

Mr. Carmichael: That might be true, but Leonard, the General Manager of the Columbia Transportation Company and who is also General Manager of the Columbia Steamship Company, makes his affidavit to this Court: "and that since that time The Columbia Transportation Company has been engaged in interstate and foreign commerce in the same manner and under the same conditions as hereinbefore set forth with respect to the business of the Columbia Steamship Company." Now, the Court understands there have been few cargoes this year and our position is that we are entitled to show the Court the manner in which the Columbia Steamship Company did busi- [fol. 81] ness and that is applicable to the Columbia Transportation Company. Mr. Leonard says so.

The Court: Isn't the whole question whether, at the time of the service of this summons, this present defendant was engaged in interstate commerce? Would it make any difference one way or the other? Although it states so in the affidavit, is that not an immaterial statement in the affidavit?

Mr. Carmichael: Why, no, it is not an immaterial statement. The Columbia Transportation Company traded share for share for the Columbia Steamship Company. It is all the same as though it was the Columbia Steamship Company, same stockholders, same thing. The Columbia Steamship Company went out of business and the Columbia Transportation Company took it on. Now, to prove the doings of the Transportation Company we are entitled to prove the doings of the Columbia Steamship Company, and it follows when grain cargoes come up this fall they will handle them as the Columbia Steamship Company did,

other cargoes they will handle as the Columbia Steamship Company did, and it is doing identically the same business,—no different,—as the Columbia Steamship Company. We can show that the Columbia Transportation Company, the defendant company, is doing business in this state, yes, but to show the ramifications of that business we have got to go into this Steamship Company.

The Court: Well, in order to have everything in the record that ought to be in the record, I am going to let you [fol. 82] put in the testimony, although at this time I do not see the materiality of it.

Mr. MacPherran: May it be understood that the testimony is received subject to the objection?

The Court: Yes.

Mr. MacPherran: And an exception noted.

(Question read as follows: "Q. Have you had any dealings with the Columbia Steamship Company or the Columbia Transportation Company?")

A. Yes.

The Court. You better state what your official connection with the company is. You are associated with the Kenneth A. Scott Company?

A. I am the Duluth representative.

The Court: That company is engaged in what business?

A. We are vessel brokers.

The Court: Q. Vessel brokers?

A. Yes.

The Court: Q. And are you handling business for the defendant company here in this case?

A. No, we do not.

The Court: Q. Just individual cargoes?

A. This cargo was loaded in Lake Michigan, outside of this state entirely.

The Court: You may proceed.

Q. Now limiting your answers to the Columbia Transportation Company, what is your relationship with the Columbia Transportation Company?

Mr. MacPherran: Just a moment.

Mr. Carmichael: I will withdraw the question.

[fol. 83] Q. When the Columbia Transportation Company has a cargo coming into the Duluth-Superior harbor, do

you do any work for the Columbia Transportation Company?

A. Yes.

Q. Do you get paid for that work?

A. Yes.

Q. Please state of what that work consists?

A. When a cargo comes into the harbor we find out from the dock when the boat will be light and send the Columbia Transportation Company a telegram.

Q. And how much are you paid for that work?

A. $10.00 a cargo.

Q. Do you represent the boat in the Duluth harbor, getting it from dock to dock?

A. We represent the boat all the time she is in the harbor.

Q. Suppose the boat is to take a cargo of grain, do you look out for the boat in getting it spotted and—

Mr. MacPherran: That is objected to as suppositions. I do not believe the witness can, by any stretch, testify to anything more than the facts—not as to what his duties are, but as to facts which may or may not establish agency.

The Court: Suppose you limit your answer to just what is done in connection with these cargoes or these boats.

A. Answering the question, that would depend upon whether we had chartered the boat for that specific cargo.

Q. Yes, Suppose you had chartered the boat for that specific cargo, then what would you do?

Mr. MacPherran: That is objected to as immaterial and irrelevant.

[fol. 84] The Court: He may answer. (Exception by defendant).

A. We would see that it was properly dispatched.

Q. And dispatched to the elevator?

A. Yes. I——

Q. What boat owned by this defendant company is in the harbor today?

A. The Steamer Goulder.

Q. Harvey——

A. Harvey D. Goulder.

Q. Harvey D. Goulder. And what have you done today relative to the Goulder?

Mr. MacPherran: That is objected to. The question here primarily is, what was the work that was being done at the time of the levy of the attachment?

The Court: He may answer.

A. Sent the Columbia Transportation Company a wire stating when she arrived and when she would be light.

Q. And do you know whether she has a cargo for the return trip or not?

Mr. MacPherran: That is also objected to as immaterial and irrelevant.

The Court: He may answer.

A. Not in this harbor.

Q. Now, coming to the time of the levy of the attachment in this case on July 1, 1932, on the steamer C. Russell Hubbard; she arrived at Allouez dock and then unloaded part of the cargo; the first part of the cargo was unloaded at [fol. 85] Pittsburg No. 5, located in Allouez, and the latter part of the cargo was unloaded at Pittsburg No. 7 on the Duluth side of the harbor; what did you do relative to that boat?

A. The same as any other coal boat—wire her in and when she would be light.

Q. And received pay for your services in the amount of $10.00?

A. Yes.

Mr. MacPherran: That is objected to as irrelevant and immaterial.

The Court: The witness has answered.

Q. All the questions you have answered so far have been with reference to the Transportation Company. Another question as to the Transportation Company: I levied on the C. Russell Hubbard and had as a defendant the Columbia Steamship Company prior to this year; you called me up and asked me what arrangements had been made for the release of that vessel; do you recall that?

Mr. MacPherran: That is objected to as wholly irrelevant and immaterial.

The Court: He may answer.

A. The captain called me on the phone and said the sheriff was on the boat.

Q. Why did the captain call you?

A. Because he knows no one else here. He knows we wire him in and out all the time, and I had known that you were representing the International Milling Company and I called you and asked what could be done to release the boat.

Q. In whose interests were you acting?

A. The boat's.

[fol. 86] Mr. MacPherran: That is objected to. The facts must be testified to and not conclusions.

The Court: It has already been answered.

Q. You represented the boat; by that you mean the boat company?

A. Well, it is our duty to get the boat unloaded as quickly as possible while she is in the harbor and naturally I would find out what the sheriff was doing on the boat.

Q. And did you wire that information in to your company?

A. That is what I said, the sheriff had attached the Hubbard, and nothing more, and I forgot it after that. I didn't hear from anybody after that.

Q. Well, I told you the boat had already gone, did I not, or arrangements made that it could go?

A. Later on in the afternoon you said she had come over to the Duluth side, so I knew it was off.

Q. Now, do you know what the captain does in the port of Duluth-Superior relative to calling on the collector of customs?

Mr. MacPherran: That is objected to as irrelevant and immaterial, incompetent and hearsay.

Mr. Carmichael: I asked him if he knows what he does.

The Court: He may answer.

A. I haven't any idea.

Q. Well, you know that the captain is required by law to call on the collector of customs for his manifest, do you not?

A. Yes. I don't know whether he does or not?

Q. All right. Now, has the Columbia Transportation Company this year transported any cargoes from the [fol. 87] Duluth-Superior harbor?

A. I don't believe so.

Q. All it has done is the delivery of cargoes here?

A. Yes, sir.

Q. Now, coming back to the Columbia Steamship Company, did you ship any grain in the season of 1929, '30, and '31, or prior years, on boats owned by the Columbia Steamship Company?

Mr. MacPherran: That is objected to for the reasons heretofore stated, irrelevant and immaterial.

The Court: He may answer.

A. Are you asking me personally?

Q. Well, your company?

A. I don't know.

Q. Do you know whether——

A. I might add, they might have prior to my coming here.

Q. Did you during the season of 1929, 1930 and 1931 represent the Columbia Steamship Company in the same capacity that you are now representing the Columbia Transportation Company?

Mr. MacPherran: That is objected to. The facts can be brought out from the witness, under our objection, but he cannot state a conclusion.

The Court: He may answer.

A. Yes.

Q. How many boats were owned by the Columbia Steamship Company?

A. Ten.

Q. They are the Frantz, Goulder——

The Court: Is that of any importance?

Mr. MacPherran: No.

Mr. Carmichael: Yes.

Q. How did the business done in 1929 and 1930 by the [fol. 88] Columbia Steamship Company compare with the business done this year by the Columbia Transportation Company?

Mr. MacPherran: That is clearly irrelevant and immaterial.

The Court: Objection sustained.

Q. At what port on the Great Lakes did the Columbia Transportation Company receive most of its cargoes?

Mr. MacPherran: That is objected to as irrelevant and immaterial.

The Court: He may answer.

Q. They have had so few this year that it is probably evenly divided.

Q. I said the Columbia Transportation Company?

A. Yes.

Q. Oh, yes. From what port on the Great Lakes did the Columbia Steamship Company ship the most of its cargoes?

Mr. MacPherran: That is objected to as irrelevant and immaterial.

The Court: He may answer.

A. Will you repeat the question?

Q. At what port on the Great Lakes did the Columbia Steamship Company ship the most of its cargoes?

A. I couldn't answer that.

Q. Well, did the Columbia Steamship Company not do the most of its business in shipping cargoes to and from the Port of Duluth?

A. No.

Q. Did not the Columbia Steamship Company ship more cargoes to Duluth than to any other port?

A. I haven't any idea what they shipped to Lake Michi-
[fol. 89] gan. I haven't any knowledge of what they shipped to other ports except Duluth, if that is a better answer.

Q. Well, did the Columbia Steamship Company ship more from Duluth-Superior than any other port?

Mr. MacPherran: That is objected to——

A. No.

Q. All right. Now, when the Columbia Steamship Company ships cargoes from Duluth, either iron ore or grain, is there a bill of lading issued in the name of the vessel?

A. Yes.

Q. Who is that done by?

A. If the cargo is ore the ore dock issues the lading in its office.

Q. Who signs it?

Mr. MacPherran: Now, may it please the Court, this is a pretty widely extended latitude, but it strikes me it is entirely irrelevant and incompetent.

The Court: Objection sustained.

Mr. Carmichael: May it please the Court, if this man knows, it becomes admissible under the affidavit made by Mr. Leonard.

The Court: Well, when you say "Who signed it?" do you mean some particular office signed it or some particular individual?

Mr. Carmichael: Some particular individual, in the case of ore cargoes.

The Court: Well, I do not see the materiality. Of course, I am letting a great deal of this in that I do not think is material and I suppose we might as well let some more of it in.

Q. In the case of grain cargoes who signs the bill of lading?

[fol. 90] The Court: You may answer.

A. I will finish the other one.

Q. All right.

A. In the case of ore cargoes some clerk at the ore dock signs the bill of lading.

Q. Is it not the captain of the vessel that signs?

A. No, the captain signs one of the copies, acknowledging the cargo, and in the case of grain cargoes whoever has chartered the boat signs the lading.

Q. And if he is located in Duluth he signs the bill of lading?

A. Yes.

Q. Now, is the bill of lading the only contract for representing the shipment of the grain?

Mr. MacPherran: That is objected to as calling for a conclusion.

Q. Between the shipper and the vessel owner?

Mr. MacPherran: Calling for a conclusion, irrelevant and immaterial and not within the scope of the agency that is attempted to be set out.

The Court: What is the purpose of this, Mr. Carmichael?

Mr. Carmichael: Well, the purpose of it is to show that in all grain cargoes a local man here in Duluth signs the bill of lading, representing the vessel, and that it is the only business relative to that cargo that is done and that is doing business in Duluth. Relative to the shipment of ore the master of the vessel signs the bill of lading, representing the ship, and that is the only evidence of a contract there is, and that is doing business in Duluth. That is the purpose of it.

(Last question read.)

A. May I have that question again? I don't understand that question.

[fol. 91] Mr. Carmichael: I will withdraw the question, then. That is all.

Cross-examination.

By Mr. MacPherran:

Q. Mr. Wick, you represent simply each individual boat as it comes here, do you not?

A. Yes sir.

Q. That is to say, anything you do has to do with simply each individual arrival and departure?

A. Yes.

Q. And whatever you do is simply in connection with the arrival and departure of that boat?

(No answer).

Q. I am talking about the facts as to the Columbia Transportation Company, the work that you do?

A. We are supposed to look after the boat while she is in the harbor.

Q. Exactly, the boat itself. You are not a member of the firm of Kenneth A. Scott & Company, are you?

A. No.

Q. And you do not, as a matter of your own knowledge, know what the arrangement is, if any, that is made between the Columbia Transportation Company and Kenneth A. Scott & Company as to the things that you do with reference to a boat that arrives?

A. Why, I think I do.

Q. Yes, but you don't actually know, do you? I will withdraw that question, Mr. Wick. I don't want to con-

fuse you or in any wise embarass you, but I will ask you this question: What you do, as you have testified to hereto-
[fol. 92] fore, is simply to wire in the arrival of the boat, to communicate with the captain and to also communicate with the dock and to attend to the actual things that would have to do with the arrival or discharge of the boat, isn't that all?

A. Well, as I testified before, when the sheriff got on the boat the captain complained and I wired the home office and told them about it and I suppose if the boat rammed the dock here I would have to tell them about it.

Mr. MacPherran: That is all.

Re-direct examination

By Mr. Carmichael:

Q. Take the case of the boat ramming the dock and the boat is injured and has to go to dry dock at Duluth-Superior harbor, what do you do?

Mr. MacPherran: That is objected to as an entirely supposition case.

The Court: Objection sustained.

[fol. 93] In District Court of St. Louis County

Case No. 69993

Certificate of Reporter

I hereby certify that the foregoing case, consisting of 19 pages of typewritten matter, is a full, true and correct transcript of the testimony taken on hearing on motion in the above entitled action.

Dated January 17, 1933.

Lee A. Labaw, Reporter.

In District Court of St. Louis County

Stipulation as to Settled Case

It is hereby stipulated and agreed, by and between the above named plaintiff and the above named defendant,

through their respective attorneys, that the transcript of testimony hereto attached, together with the affidavits of Otto Gentz, L. M. Leonard, Robert G. McCreary and E. W. MacPherran submitted on behalf of the defendant, and the affidavit of H. A. Carmichael submitted on behalf of the plaintiff, may be taken and considered as the settled case [fol. 94] herein and that the Court may make and file its order settling and allowing the same as the settled case herein.

Dated January 31, 1933.

Mitchell, Gillette, Nye & Harries, Attorneys for Plaintiff. Abbott, MacPherran, Dancer, Gilbert & Doan, Attorneys for Defendant.

IN DISTRICT COURT OF ST. LOUIS COUNTY

ORDER SETTLING CASE

Upon the foregoing stipulation, it is hereby ordered: That the affidavits and transcript mentioned in the foregoing stipulation may be and they are hereby settled and allowed as the settled case herein.

Dated February 2, 1933.

By the Court.

C. R. Magney, District Judge.

[fol. 95] IN DISTRICT COURT OF ST. LOUIS COUNTY

NOTICE OF MOTION TO STRIKE

To the above named defendant and to its Attorneys, Messrs. Abbott, MacPherran, Dancer, Gilbert & Doan:

Please take notice: That on the files and proceedings herein, the Plaintiff will move the Court, at chambers, in the City of Duluth, Minnesota, on the 3rd day of September, 1932, at 9:30 o'clock A. M., or as soon thereafter as Counsel can be heard, for an order striking from the files and records herein the affidavit of E. W. MacPherran, Esq., attached to the defendant's motion for an order setting aside the service of summons and vacating the writ of

attachment herein, on the ground that said affidavit is wholly irrelevant and immaterial to a decision of the defendant's said motion.

Mitchell, Gillette & Carmichael, Attorneys for Plaintiff, 1200 Alworth Building, Duluth, Minnesota.

[fol. 96] In District Court of St. Louis County

Order Vacating Writ of Attachment, etc.

The above entitled matter came on for hearing before the undersigned, upon motion by defendant, appearing specially, for an order setting aside the purported service of the summons in the above entitled action claimed to have been made on the defendant on July 1st, 1932, and vacating and setting aside the attachment and purported service and levy thereof on July 1st, 1932, by the Sheriff of St. Louis County, Minnesota, upon the ground and for the reason that heretofore in an action between the same parties in interest in the above entitled action on the same cause of action as the cause of action herein and upon the same procedure the Court, on March 2nd, 1932, made and filed an order setting aside the purported service of summons and vacating and setting aside the attachment therein, and that said order was appealable; and on motion by the defendant, appearing specially, for an order setting aside and vacating the writ of attachment and the purported service and levy thereof by the Sheriff of St. Louis County, Minnesota, on July 1st, 1932, upon the ground and for the reason that the said purported service and levy of said writ of attachment and the prosecution of said action in this Court operate to place unreasonable conditions, burdens and restraints upon the defendant's constitutional right to engage in interstate commerce, in violation of the provisions of Article I, Sec. 8, Subdivision 3 of the Con-
[fol. 97] stitution of the United States; and on motion by the defendant, appearing specially, for an order setting aside the purported service of the summons in the above entitled action claimed to have been made on the defendant by delivering a copy thereof to Otto Gentz on the 1st day of July, 1932, upon the ground and for the reason that the said purported service and the prosecution of said

action in this court operates to place unreasonable conditions, burdens and restraints upon defendant's constitutional right to engage in interstate commerce, in violation of the provisions of Article I, Sec. 8, Subdivision 3 of the Constitution of the United States of America.

E. W. MacPherran, Esq., of Abbott, MacPherran, Dancer, Gilbert & Doan, attorneys for the defendant, appeared specially in behalf of said motions, and H. A. Carmichael, Esq., of Mitchell, Gillette & Carmichael, attorneys for the plaintiff, appeared in opposition thereto.

The Court being fully advised in the premises.

It is ordered that the writ of attachment and the purported service and levy thereof by the sheriff of St. Louis County, Minnesota, on July 1, 1932, and the purported service of the summons in this action claimed to have been made on defendant by delivering a copy thereof to Otto Gentz on the 1st day of July, 1932, be and the same are hereby vacated and set aside, on the ground and for the reason that said purported service and levy of attachment and purported service of the summons in the main action and the prosecution of the said action in this court operate [fol. 98] to place unreasonable conditions, burdens and restraints upon interstate commerce, in violation of the provisions of Article I, Sec. 8, Subdivision 3 of the Constitution of the United States.

By the Court.

C. R. Magney, District Judge.

Dated at Duluth, Minnesota, this 22nd day of December, 1932.

You are hereby notified by this copy that the original Order was filed in this office on Dec. 23, 1932.

J. P. Johnson, Clerk, by H. E. Johnson, Deputy.

In District Court of St. Louis County

Memorandum

The memoranda of Judge Kenny attached to his orders in Chance W. Clark v. Columbia Steamship Company, a corporation, cover the situation here presented. The testimony of Wick taken at the hearing does not, in my opinion, alter the situation.

[fol. 99] In District Court of St. Louis County

Notice of Appeal

To Messrs. Abbott, MacPherran, Dancer, Gilbert & Doan, Attorneys for the above named Defendant, and to J. P. Johnson, Esquire, Clerk of said Court:

Please take notice: That the above named plaintiff, International Milling Company, appeals to the Supreme Court of the State of Minnesota, from the order of said District Court dated December 22nd, 1932 and filed in the office of the Clerk of said Court on December 23rd, 1932, wherein and whereby it is ordered that the writ of attachment and the purported service and levy thereof by the Sheriff of St. Louis County, Minnesota, on July 1st, 1932 and the purported service of the summons in the within action claimed to have been made on defendant by delivering a copy thereof to Otto Gentz on July 1st, 1932 are vacated and set aside; and from the whole thereof.

Dated this 24th day of January, 1933.

Mitchell, Gillette, Nye & Harries, Attorneys for Plaintiff, 1200 Alworth Building, Duluth, Minnesota.

[fols. 100-102] Personal service of the above Notice of Appeal is hereby admitted this 24th day of January, 1933.

Abbott, MacPherran, Dancer, Gilbert & Doan, Appearing Specially as Attorneys for Defendant. J. P. Johnson, Clerk of said District Court.

Bond on Appeal for $250.00 omitted in printing.

Endorsed: Filed September 1, 1933. Grace Kaercher Davis, Clerk Minn. Supreme Court

St. Louis County

Stone, J. Wilson, C. J., Olsen, J.; Loring, J., Dissenting

No. 144. 29466

INTERNATIONAL MILLING COMPANY, Appellant,

vs.

COLUMBIA TRANSPORTATION Co., Respondent

Syllabus

Plaintiff, a domiciled foreign corporation, sues for negligent damage to a cargo of grain while in defendant's storage at Chicago, Illinois, or being thence transported by it to Buffalo, New York. Summons was served upon the master of one of defendant's ships, which was simultaneously levied on under writ of attachment, while discharging an interstate cargo, in the interstate waters of Duluth-Superior harbor. Defendant has no office or agent in Minnesota and does no business here except for the occasional discharge of an interstate cargo at Duluth. All the witnesses necessary for defendant's trial of the case reside at Milwaukee, Wisconsin; Chicago, Illinois and points east thereof. Held, upon the authority of Davis v. Farmers Cooperative Company, 262 U. S. 312, 67 L. Ed. 996, that the prosecution of the action in this state would cause a serious and unreasonable burden upon interstate commerce, and that the service of summons and the attachment were properly vacated upon that ground.

Affirmed.

OPINION

STONE, Justice:

Plaintiff appeals from an order vacating service of the summons and a simultaneous levy under writ of attachment.

Plaintiff is a Delaware corporation, with its principal office in Minneapolis, Minnesota. Defendant also is a Delaware corporation, with its principal office at Cleveland,

Ohio. As a private carrier, it operates a line of freight ships on the Great Lakes, almost wholly in interstate traffic. The gist of plaintiff's alleged cause of action is that, about January 1, 1930, at South Chicago, Illinois, defendant stored for it in one of its ships, the "W. C. Richardson," a large cargo of wheat; that the grain was kept in storage until May, 1930, and then transported by defendant to Buffalo, New York; that it was in good order when delivered aboard the Richardson, but that, during the course of storage at South Chicago and transportation thence to Buffalo, it was damaged, through the negligence of defendant, in the sum of nearly $20,000.

Defendant has no office or agent and does no business in or local to Minnesota. Occasionally it discharges interstate cargoes at Duluth. Jurisdiction of it was attempted to be gained as follows: July 1, 1932, one of defendant's ships, the "C. Russell Hubbard," entered the Duluth-Superior harbor from Lake Superior through the Wisconsin entrance and docked at Allouez, Wisconsin, for the purpose of discharging there a cargo of coal. During that operation, a deputy sheriff of St. Louis county boarded the vessel and served upon the ship's master, Captain Gentz, as agent of defendant, the summons in this action, at the same time levying upon the ship under writ of attachment.

On motion of defendant, both service of the summons and levy were vacated upon the ground, not that the service of summons and attachment in the manner indicated were, but that the prosecution and trial of the action in St. Louis county would be, a violation of the commerce clause of the federal constitution, under the rule of Davis v. Farmers Cooperative Co., 262 U. S. 312, 67 L. Ed. 996.

The propriety of the order upon the ground stated is the only thing for our consideration. We affirm, for in our judgment it comes squarely within the theory of the controlling decisions of the Supreme Court of the United States. In the Davis case a statute of Minnesota (L. 1913, C. 218; G. S. 1913 § 7735), authorizing service of summons upon a foreign corporation by service upon any agent in this state "for the solicitation of freight and passenger traffic or either thereof over its lines outside of this state," was held unconstitutional in application to a foreign railroad company having no trackage in the state. Referring to the fact that the jurisdiction thus sought to be acquired was "not

limited to suits arising out of business transacted within Minnesota" but was asserted by the statute "whatever the nature of the cause of action, wherever it may have arisen, and although the plaintiff is not and never has been a resident of the state," the court held that the resulting burden imposed upon interstate commerce was so serious and unreasonable that the statute was obnoxious to the commerce clause. The unlawful burden so imposed was found in the subjection of interstate carriers to litigation in states and jurisdictions far remote from that in which the cause of action arose, thereby causing absence of employes from their customary occupations and so impairing efficiency and economy of operation. That was considered offensive "to orderly, effective administration of justice," which was the "paramount" desideratum.

The record does not show that plaintiff will be unduly hampered by trying this action in Illinois or Ohio or New York, in one or more of which the cause of action arose and the underlying contract was made and more-or-less performed. The record does show (at least it was an issue of fact, decided for defendant below, the decision being controlling upon us) that defendant would be greatly harassed by having to defend the action in Minnesota. Aside from the fact that it never does or solicits business here, other than discharging interstate cargoes at Duluth, all or nearly all of its officers are in Cleveland, Ohio. None of them are in this state. The record indicates, and it was so taken below, that numerous witnesses with knowledge of the facts would be needed by defendant. Doubtless many of the same witnesses will be wanted by plaintiff. But all of them reside at or east of Chicago, except that one or more members of the crew of the Richardson are said to reside at Milwaukee, Wisconsin. Taking the issue of fact presented by the affidavits, for and against the motion, as decided by the trial court, we are wholly unable to see why the further prosecution of this cause in Minnesota would not burden interstate commerce as much and in the same manner, and generally to the same extent, as the statute invalidated by the Davis case.

We do not forget that plaintiff has a corporate residence in Minnesota, or that, although a foreign corporation, its principal office is here. That circumstance tends to reduce its unreasonableness, but it does not at all lessen the bur-

den to interstate commerce which would result from the prosecution of this action in Minnesota. The Davis case is not the last word on the subject. The same result was reached, and for the same reasons, in A. T. & S. F. R. Co. v. Wells, 265 U. S. 101, 68 L. Ed. 928; Mich. Central R. Co. v. Mix, 278 U. S. 492, 73 L. Ed. 470; Denver & R. G. W. R. Co. v. Terte, 284 U. S. 284, 76 L. Ed. 295. The Terte case was one in prohibition, commenced in the Supreme Court of Missouri, to prevent the prosecution in the courts of that state of an action by one Curtis, "then residing in Missouri." As against one of the defendants in that action (the Atcheson, Topeka, and Santa Fe Ry. Co.) it was held that prohibition was properly denied because it had trackage and was doing a substantial business in Missouri. But the other defendant (the Denver & Rio Grande Western R. Co.) was held entitled to prohibition against proceedings in the state court because it "neither owns nor operates any line in Missouri," although employing local agents there for soliciting traffic. It was as much, but no more, out of Missouri in a physical sense and for all business purposes as the defendant in the instant case is out of Minnesota. The prosecution of the Curtis case against the Rio Grande in Missouri would have been no more of a burden upon interstate commerce than would be the prosecution of this one in Minnesota. Curtis, so far as the opinion discloses, was a bona fide resident of Missouri, although the accident for which he sought damages had occurred in Colorado. So, the cause of action having accrued in another state, the single fact of the plaintiff's residence in the state of the forum was held insufficient to make the resulting burden on interstate commerce of the suit in Missouri sufficiently reasonable to avoid the interdiction of the commerce clause. We think that case controlling here as against the argument for plaintiff that its corporate residence in Minnesota is sufficient for us to remove the case from the doctrine of the decision in Davis v. Farmers Co-operative Co. supra.

There is nothing in Missouri ex rel. St. L. B. & M. R. Co. v. Taylor, 266 U. S. 200, 69 L. Ed. 247, or Hoffman v. Missouri, 274 U. S. 21, 71 L. Ed. 905, to enable us to sustain jurisdiction. The Taylor case was on claims for damage to freight. That the plaintiff was a resident of Missouri, where the action against which prohibition was sought was commenced,

was but one, and not the main, circumstance distinguishing the situation from that now present. The decision emphasized that "the shipment out of which the cause of action arose was of goods deliverable in Missouri; and, for aught that appears, the negligence complained of occurred within Missouri." In the Hoffman case prohibition against the further prosecution in Missouri of a personal injury action was held properly denied because the case was brought not only "in a county traversed by the railroad, in which it has an office and an agent for the transaction of business," but also because the defendant "railroad is a Missouri corporation." The Davis case was distinguished, not because of anything concerning the plaintiff, who was a resident of Kansas, but because of the status, in respect to the suit, of the defendant. The defendant railroad, the court said, "is not a foreign corporation; it is sued in the state of its incorporation. It is sued in a state in which it owns and operates a railroad. It is sued in a county in which it has an agent and a usual place of business. It is sued in a state in which it carries on doubtless intrastate as well as interstate business."

That residence of a plaintiff is not of controlling importance is emphasized, implicitly but significantly, in the Mix case, where it was held that a Michigan railroad corporation could not be sued in Missouri by the widow of one of its former employes killed in its service in Michigan, although the widow had become in the meantime a resident of Missouri. We do not attach importance one way or the other to a residence acquired under such circumstances. The significant thing is that the Taylor and Hoffman cases were distinguished not at all upon the ground of residence or nonresidence of the plaintiff. The former was commented upon as one where "it appeared that the shipment out of which the cause of action arose was of goods deliverable in Missouri;" and also "that the negligent acts complained of may have occurred within the state." The Hoffman case was referred to as one where the defendant railroad "was organized under the laws of the state, and operated part of its line in the county in which the action was brought." That last comment sufficiently distinguishes our own case of Boright v. C. R. I. & P. R. Co. 180 Minn. 52, 230 N. W. 457. There we held that in a suit by a nonresident jurisdiction was properly retained of a foreign

railroad company which, although interstate in character, owned and operated 280 miles of trackage in this state.

Because, under the controlling decisions above mentioned, the further prosecution of this action would result in a serious and unreasonable burden upon interstate commerce, and because plaintiff's corporate residence here as a domiciled foreign corporation is not sufficient to make the burden so imposed a reasonable one, the order appealed from must be and is

Affirmed.

Stone, J.

WILSON, Chief Justice:

I concur in the dissents.

OLSEN, Justice, dissenting:

I dissent on the ground that by the attachment of property within this state jurisdiction to the extent of such property was acquired and where a foreign corporation brings its property here and jurisdiction is acquired over it the interference, if any, with interstate commerce is but incidental and in fact invited by the defendant. Rosenblet v. Pere Marquette R. Co. 162 Minn. 55.

Olsen, J.

LORING, Justice, dissenting:

A foreign corporation is not immune from the orderly processes of state courts, although its business is wholly interstate in character. The requirements of justice are paramount unless submission thereto in the state where jurisdiction is sought imposes an unreasonable obstruction or undue burden upon interstate commerce. Davis v. Farmers Co-op. Equity Co. 262 U. S. 312, 67 L. Ed. 996.

The sole question here presented appears to be whether or not the suit begun by levy upon defendant's ship upon a cause of action arising in another state is an unreasonable burden upon interstate commerce and consequently a violation of the commerce clause of the federal constitution.

The case of Davis v. Farmers Co-op. Equity Co. 262 U. S. 312, 67 L. Ed. 996, was the first to establish the doctrine that an unreasonable burden in violation of the commerce clause might be placed on interstate commerce by subjecting a carrier to legal process in a state where it did not

operate. While conceding that a foreign corporation engaged exclusively in interstate commerce was not immune from the orderly process of state courts, it held that the commerce clause of the federal constitution protected the foreign carrier from suit (a) in a state where the cause of action did not arise and (b) in which the transaction giving rise to it was not entered upon, and (c) in which the carrier neither owned nor operated a railroad and (d) in which the plaintiff did not reside. Atchison, etc. Ry. Co. v. Wells, 265 U. S. 101, 68 L. Ed. 928, followed the Davis case on similar facts.

Which of the various objections made to the Minnesota statute in the Davis case is of controlling importance or must all concur in order to constitute the objectionable burden? The necessity for taking witnesses from the state where the cause arose to the state where jurisdiction is sought is not controlling for in Hoffman v. Missouri ex rel. Foraker, 274 U. S. 21, 71 L. Ed. 905, witnesses were to be taken from Kansas to Missouri and as against the Santa Fe in Denver & R. G. v. Terte, 284 U. S. 284, 76 L. Ed. 295, they were required to be taken from Colorado to Missouri. The fact alone that the cause of action arose in a foreign jurisdiction was not controlling in either of those cases. They were both imported. Neither did the transaction out of which the cause arose in either case take place in the state where suit was brought. The residence of the plaintiff was not sufficient to lift the burden in Michigan Central v. Mix, 278 U. S. 492, or in Denver & Rio Grande v. Terte, 284 U. S. 284, nor was his nonresidence sufficient to impose it in the Hoffman case. In the case at bar it is my understanding that the plaintiff, though a foreign corporation, has its principal place of business here. Such was the case in Missouri v. Taylor, 266 U. S. 200, 69 L. Ed. 247, though probably not of controlling importance to the holding that the suit was not an unreasonable burden.

Of all the features suggested as objectionable in the Davis case we have left as possibly of vital importance only the non operation or conduct of business in the state where jurisdiction is sought. I am the more impressed with the controlling importance of this element from a reading of Denver & Rio Grande v. Terte, supra.

In that case an employe at an interlocking track and signal plant after acquiring a bona-fide residence in Mis-

souri sued, in that state, the Rio Grande railroad and the Santa Fe, by both of which he had been employed, for injuries received in Colorado. The Santa Fe was a Kansas corporation licensed to operate its railroad in Missouri whereas the Rio Grande operated no road in that state. Jurisdiction of the latter was sought by garnishment of traffic balances owed it by several railroad companies. It was held that a trial in Missouri would unreasonably burden interstate commerce as to the Rio Grande but not as to the Santa Fe. If the bringing of witnesses from Colorado were the controlling feature of the burden upon commerce, it was equally as burdensome for the Santa Fe as for the Rio Grande. Evidently we must look farther for the controlling distinction. The Santa Fe although a foreign corporation operated a railroad in Missouri. On the authority of Hoffman v. Missouri ex rel. Foraker, 274 U. S. 21, 71 L. Ed. 905, the court said the burden on the Santa Fe was not unreasonable. Hoffman was a resident of Kansas suing a Missouri railroad for injuries received on its line in Kansas. One of the controlling considerations moving the Supreme Court to hold the burden not unreasonable was the operation of the defendant's road in Missouri. True it was a Missouri corporation, but the state of incorporation is not controlling, because in the Terte case the Santa Fe was a nonresident, though licensed in Missouri. If the taking of witnesses from one state to another were the controlling consideration, the residence of the defendant would make no difference.

If any logical deduction can be drawn from the various cases, it seems to be that the operation of a railroad within the state where jurisdiction is sought is the important and controlling consideration. So far as commerce is concerned, I cannot see the distinction between operating a railroad into a state, as did the Santa Fe in the Terte case, and operating a line of steamships into one of its ports as in the case at bar. Fortunately for the steamship line it does not have to own right of way and trackage, but it does operate its ships into state waters and there docks, unloads and loads them. This it does with its own crews and employes just as much under its control as if it were operating a railroad to convey the same goods and passengers. It brings its property into the state just as effectively and for the same purpose as does a railroad. That defendant

by confining its operations to interstate business avoids the necessity of taking a license to do business in this state is not important. As said in the Hoffman case:

"Even a foreign corporation is not immune from the ordinary processes of the courts of a state where its business is entirely interstate in character. International Harvester Co. v. Kentucky, 234 U. S. 579. It must submit, if there is jurisdiction, to the requirements of orderly, effective administration of justice, although thereby interstate commerce is incidentally burdened."

I therefore concur with Mr. Justice Olsen that jurisdiction was acquired in the case at bar to the extent of the property attached, and that interstate commerce is not thereby subjected to an unreasonable burden.

Loring, J.

STATE OF MINNESOTA:

SUPREME COURT

29466

INTERNATIONAL MILLING COMPANY, a Corporation,
Appellant,

vs.

THE COLUMBIA TRANSPORTATION COMPANY, a Corporation,
Respondent

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the order of the Court below, herein appealed from, to-wit, of the District Court within and for the County of St. Louis be and the same hereby is in all things affirmed and that the writ of attachment and the purported service and levy thereof by the Sheriff of St. Louis County, Minnesota, on July 1st, 1932, and the purported service of the summons in the within action claimed to have been made on defendant by delivering a copy thereof to Otto Gentz on July 1st, 1932, are hereby vacated and set aside; and it is further determined and adjudged that respondent herein do have and recover of appellant herein the sum and amount of Forty-two and 50/100 Dollars, ($42.50) costs and disburse-

ments in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed Sept. 29, 1933.

By the Court.

Attest:

Grace Kaercher Davis, Clerk.

Statement for Judgment

Statutory Costs, $25.00; Printer, $17.50; Clerk, $—; Acknowledgments, $—; Return, $—; Postage and Express, $—; Filing Mandate, $—; Transcript, $—; Appeal Bond, $—; Total, $42.50.

STATE OF MINNESOTA, ss:

SUPREME COURT

MANDATE

The State of Minnesota to the Honorable Judge and Officers of the District Court within and for the County of St. Louis, Greeting:

Whereas, Lately in your Court, in an action therein pending entitled International Milling Company, a corporation, Plaintiff, and The Columbia Transportation Company, a corporation, Defendant, a certain order was entered therein December 22, 1932, from which action of your Court an appeal thereafter was taken to this Court;

And Whereas, The said cause came on to be heard before our Supreme Court, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the order of the Court below herein appealed from, be, and the same hereby is, in all things affirmed and that the writ of attachment and the purported service and levy thereof by the Sheriff of St. Louis County, Minnesota, on July 1st, 1932 and the purported service of the summons in the within action claimed to have been made on defendant by delivering a copy thereof to Otto Gentz on July 1st, 1932, are hereby vacated and set aside; and that judgment be entered accordingly. A copy of the entry of judgment thereupon in this Court is herewith transmitted and made part of this Remittitur.

Now Therefore, This mandate is to you directed and certified, to inform you of these proceedings had in our Supreme Court, in said hereinbefore mentioned cause, and the same is hereby and herewith remanded to your Court for such other or further record and proceedings therein as may be by law necessary, just and proper, under and by virtue of the said order herein made.

Witness The Honorable John P. Devaney, Chief Justice of the Supreme Court aforesaid, and the seal of said Court at St. Paul, this Oct. 6, 1933.

Grace Kaercher Davis, Clerk of the Supreme Court,
by —— ——, Deputy. (Seal.)

STATE OF MINNESOTA,
County of St. Louis:

DISTRICT COURT, ELEVENTH JUDICIAL DISTRICT

INTERNATIONAL MILLING COMPANY, a Corporation, Plaintiff,

vs.

COLUMBIA TRANSPORTATION COMPANY, a Corporation,
Defendant

STIPULATION

It is hereby stipulated and agreed by and between the above named plaintiff and the above named defendant, through their respective attorneys, that judgment in the above entitled action may be entered by the Clerk of the above named court in the form hereto attached.

Dated October 7th, 1933.

Mitchell, Gillette, Nye & Harries, Attorneys for Plaintiff. Abbott, MacPherran, Dancer, Gilbert & Doan, Attorneys for Defendant.

Pursuant to the foregoing stipulation for Judgment let judgment be entered accordingly.

C. R. Magney, Judge.

STATE OF MINNESOTA,
County of St. Louis:

DISTRICT COURT, ELEVENTH JUDICIAL DISTRICT

INTERNATIONAL MILLING COMPANY, a Corporation, Plaintiff,

vs.

COLUMBIA TRANSPORTATION COMPANY, a Corporation, Defendant

JUDGMENT

An order having been entered herein on December 22d, 1932, vacating and setting aside the writ of attachment and the purported service and levy thereof and the purported service of summons herein, from which order an appeal was thereafter taken to the Supreme Court of Minnesota; and said Supreme Court of Minnesota having in all things affirmed said action of the District Court and having adjudged that the writ of attachment and the purported service and levy thereof and the purported service of summons in said action be vacated and set aside;

And it appearing that the parties hereto have stipulated for the entry of a judgment in said matter in this court:

Now, pursuant to said judgment of the Supreme Court of Minnesota and upon the stipulation of the parties aforesaid,

It is hereby determined and adjudged that the writ of attachment and the purported service and levy thereof by the Sheriff of St. Louis County, Minnesota, on July 1, 1932 and the purported service of summons in the within action claimed to have been made on the defendant by delivering a copy thereof to Otto Gentz on July 1, 1932, are hereby vacated and set aside.

And it is further determined and adjudged that the defendant herein do have and recover of the plaintiff herein the sum and amount of $10.00 costs and disbursements in this cause in this court.

Witness the Honorable C. R. Magney, Judge of the District Court aforesaid, at Duluth, Minnesota, this 9th day of October, A. D. 1933.

J. P. Johnson, Clerk of the District Court, by R. E. Johnson, Deputy Clerk.

Endorsed: Filed in my office at — o'clock —, Oct. 9, 1933. J. P. Johnson, Cl'k Dist. Court, by R. E. Johnson, Deputy.

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STATE OF MINNESOTA,
County of St. Louis:

DISTRICT COURT, ELEVENTH JUDICIAL DISTRICT

INTERNATIONAL MILLING COMPANY, a Corporation, Plaintiff,

vs.

COLUMBIA TRANSPORTATION COMPANY, a Corporation, Defendant

NOTICE OF APPEAL

To the above-named defendant, to Messrs. Abbott, MacPherran, Dancer, Gilbert & Doan, its attorneys, and to J. P. Johnson, clerk of the above-named court:

You and each of you will please take notice that the plaintiff, International Milling Company, hereby appeals to the Supreme Court of the State of Minnesota from the judgment entered in the above entitled action by said Court on the 9th day of October, 1933, whereby it was determined and adjudged that the writ of attachment and the purported service and levy thereof by the Sheriff of St. Louis County, Minnesota on July 1, 1932, and the purported service of summons in the within action claimed to have been made on defendant by delivering a copy thereof to Otto Gentz on July 1, 1932, be vacated and set aside and that the defendant have and recover of the plaintiff the sum of $10.00 costs and disbursements.

Mitchell, Gillette, Nye & Harries, Attorneys for Plaintiff, 1200 Alworth Building, Duluth, Minnesota.

Due and personal service of the within Notice of Appeal is hereby admitted by receipt of a copy thereof this 10" day of October, 1933; and cost and supersedeas bonds on such appeal are hereby specifically waived.

Abbott, MacPherran, Dancer, Gilbert & Doan, Attorneys for Defendant. J. P. Johnson, Clerk of District Court.

Filed in my office at — o'clock — M. Oct. 10, 1933. J. P. Johnson, Clk. Dist. Court, by R. E. Johnson, Deputy.

STATE OF MINNESOTA:

IN SUPREME COURT

29814

INTERNATIONAL MILLING COMPANY, Appellant,

vs.

COLUMBIA TRANSPORTATION COMPANY, Respondent

Ordered that the appeal in the above entitled matter be submitted to the court upon the printed record hereto filed in case No. 29466 bearing the same title, together with the files of the District Court of St. Louis County, Minnesota showing subsequent proceedings had in that court.

Dated Oct. 16, 1933.

John P. Devaney, Chief Justice.

Filed Oct. 16, 1933. Grace Kaercher Davis, Clerk.

29814

INTERNATIONAL MILLING COMPANY, Appellant,

vs.

COLUMBIA TRANSPORTATION COMPANY, Respondent

Per CURIAM:

Appeal from a judgment. The case was here before and our opinion filed September 1, 1933. For the reasons given in the previous opinion and upon authority of that opinion the judgment appealed from is affirmed.

Filed Oct. 17, 1933. Grace Kaercher Davis, Clerk.

STATE OF MINNESOTA:

SUPREME COURT

29814

INTERNATIONAL MILLING COMPANY, a Corporation,
Appellant,

vs.

COLUMBIA TRANSPORTATION COMPANY, a Corporation,
Respondent

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of St. Louis be and the same hereby is in all things affirmed.

Dated and signed Oct. 17, 1933.

By the Court.

Attest:

Grace Kaercher Davis, Clerk.

STATE OF MINNESOTA, ss:

SUPREME COURT

I, Grace Kaercher Davis, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul Oct. 17, 1933.

Grace Kaercher Davis, Clerk, by —— ——, Deputy.
(Seal of the Supreme Court, State of Minnesota.)

[Endorsed:] State of Minnesota, Supreme Court. 29814. International Milling Company, a corporation, Appellant, vs. Columbia Transportation Company, a corporation, Respondent. Transcript of Judgment. Filed Oct. 17, 1933. Grace Kaercher Davis, Clerk.

STATE OF MINNESOTA:

IN SUPREME COURT

29814

INTERNATIONAL MILLING COMPANY, Appellant,

vs.

COLUMBIA TRANSPORTATION COMPANY, Respondent

ORDER STAYING PROCEEDINGS

Upon application of appellant herein,

It is ordered that all further proceedings herein be, and they are hereby stayed pending application to the United States Supreme Court for a writ of certiorari to review the proceedings in the above entitled action.

Dated October 17, 1933.

John P. Devaney, Chief Justice Minnesota Supreme Court.

Filed Oct. 17, 1933. Grace Kaercher Davis, Clerk.

STATE OF MINNESOTA:

IN SUPREME COURT

I, Grace Kaercher Davis, Clerk of said Court, do hereby certify that the foregoing pages numbered from 1 to — inclusive, are a true, full and complete transcript of the record and proceedings in the case of International Milling Company, Appellant, vs. Columbia Transportation Company, Respondent, 29814, and also of the opinions of the court rendered therein as the same now appear on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at my office, in the city of Saint Paul, Minnesota, this Oct. 19, 1933.

Grace Kaercher Davis, Clerk of Supreme Court.

(Seal of the Supreme Court, State of Minnesota.)

[fol. 124] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 11, 1933

The petition herein for a writ of certiorari to the Supreme Court of the State of Minnesota is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,164. Minnesota Supreme Court. Term No. 561. International Milling Company, Petitioner, vs. Columbia Transportation Company. Petition for a writ of certiorari and exhibit thereto. Filed October 30, 1933. File No. 561, O. T., 1933.

FILED

No. 661

INTERNATIONAL MILLING COMPANY, Petitioner,

vs.

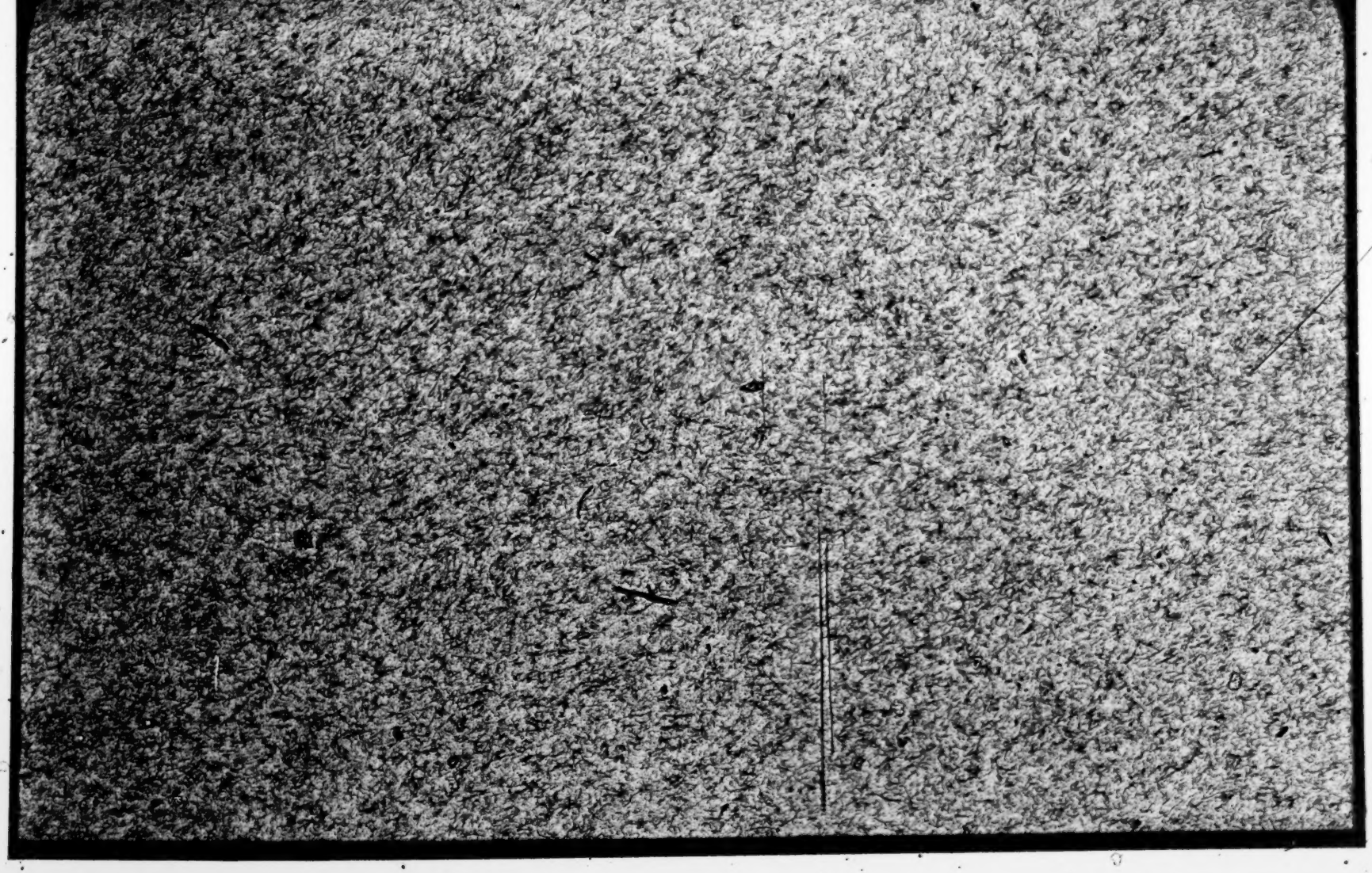
COLUMBIA TRANSPORTATION COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA AND BRIEF IN SUPPORT THEREOF.

Elmer Mitchell,
Albert G. Gillette,
Counsel for Petitioner.

Mitchell, Gillette, Nye & Hartley,
Duluth, Minnesota,

Bigham, Jones, Englar & Houston,
New York, N. Y.,
Of Counsel.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 561

INTERNATIONAL MILLING COMPANY, A CORPORATION, PETITIONER,

vs.

COLUMBIA TRANSPORTATION COMPANY, A CORPORATION, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of International Milling Company, plaintiff in the above entitled proceeding, respectfully represents as follows:

I.

Summary Statement of the Matter Involved.

The above entitled proceeding is an action at law by International Milling Company, a Delaware corporation, duly qualified to do business in Minnesota, as plaintiff, against Columbia Transportation Company, a Delaware corpora-

tion not qualified to do business in Minnesota (but which operates its vessels in interstate commerce over Minnesota waters), as defendant, to recover for damage to a cargo of wheat while stored in the steamer "W. C. Richardson" at South Chicago, Illinois, from about January 1, 1930, to May 1, 1930. Jurisdiction of the defendant to the extent of the property attached was acquired through the attachment of one of the vessels of the defendant company, the steamer "C. Russell Hubbard" (R. 12).

It appears without dispute that the attachment and service of process was made while the vessel was upon waters over which the State of Minnesota has jurisdiction, pursuant to Article II, Section 2, of the Constitution of Minnesota, which reads as follows:

> "The State of Minnesota shall have concurrent jurisdiction on the Mississippi and all other rivers and waters bordering on the said State of Minnesota, so far as the same shall form a common boundary to said state, and any other state or states now or hereafter to be formed by the same; and said rivers and waters, and navigable waters leading into the same, shall be common highways and forever free, as well to the inhabitants of said state as to other citizens of the United States, without any tax, duty, impost, or toll therefor."

Boundaries of the state are fixed and determined by Section 1 of the same Article, which, in part, reads as follows:

> "* * * thence east along the northern boundary of said state to the main channel of the Mississippi River; thence up the main channel of said river and following the boundary line of the State of Wisconsin until the same intersects the St. Louis River; thence down the said river to and through Lake Superior, on the boundary line of Wisconsin and Michigan, until it intersects the dividing line between the United States

and British possessions; thence up Pigeon River and following said dividing line to the place of beginning."

Immediately after the levy and attachment and service of the summons and complaint, the defendant filed an undertaking in the sum of $40,000 (R. 15), for the release of the attachment; and the court thereupon ordered the attachment released (R. 17). The defendant, appearing specially, then secured an order to show cause (R. 17) why an order should not be made setting aside the service of the summons and vacating and setting aside the attachment upon the following grounds:

1. That such an order had been previously entered in a case between the same parties, involving the same matter, and was therefore *res adjudicata*. This point was not discussed or referred to by the trial court in its order, nor by the Supreme Court of Minnesota in its opinion, and is not here involved.

2. That the service and levy of the attachment operated to place an unreasonable burden upon interstate commerce.

3. That the service of the summons and the prosecution of the action operated to place an unreasonable burden upon interstate commerce.

This motion, which was heard upon affidavits and oral testimony, was granted (R. 96), "on the ground and for the reason that said purported service and levy of attachment and purported service of summons in the main action and the prosecution of said action in this Court operate to place unreasonable conditions, burdens and restraints upon interstate commerce, in violation of the provisions of Article I, Section 8, subdivision 3 of the Constitution of the United States."

Upon appeal by the plaintiff to the Supreme Court of Minnesota, this order was affirmed by a divided court, three of the seven justices dissenting, said appeal being Docket No. 29466 in the Minnesota Supreme Court.

Thereafter judgment was entered in the trial court, from which a second appeal was taken for jurisdictional purposes, and resulted in affirmance of the judgment on the basis of the court's previous decision. This second appeal was No. 29814 on the docket of the Supreme Court of Minnesota.

A certified copy of the entire record of the case in the District Court of St. Louis County, Minnesota, and in the Supreme Court of Minnesota is submitted herewith, including both Appeal No. 29466 and Appeal No. 29814 in said Supreme Court.

The sole question involved is whether the prosecution in Minnesota of a transitory cause of action by a foreign corporation duly qualified to do business within the state, against a foreign corporation not qualified to do business in the state but which operates, in interstate commerce, a line of vessels throughout the navigation season to and from Minnesota ports and upon waters over which the State of Minnesota has jurisdiction, upon a cause of action which arose without the state, and wherein jurisdiction was obtained by the attachment of property within the state to the extent of such property, imposes an unreasonable obstruction or undue burden upon interstate commerce, in violation of the commerce clause of the Constitution (Article I, Section 8, subdivision 3).

It was the contention of the petitioner that under the decisions of this Honorable Court no unreasonable burden was so imposed and that the cause was one which could be tried within the State of Minnesota without violation of the commerce clause.

The decisions upon which such reliance was placed are the following:

Davis v. *Farmers Co-operative Co.*, 262 U. S. 312;
Atchison, T. & S. F. R. Co. v. *Wells*, 265 U. S. 101;
Missouri ex rel. St. Louis B. & M. R. Co. v. *Taylor*, 266 U. S. 200;
Hoffman v. *Missouri ex rel. Foraker*, 274 U. S. 21;
Michigan Central Railroad Co. v. *Mix*, 278 U. S. 492;
Denver & R. G. W. R. Co. v. *Terte*, 284 U. S. 284.

Reasons Relied Upon for Allowance of the Writ.

While the question presented by this record has not been passed upon by this Honorable Court under a state of facts precisely the same as that here involved, it is believed by the petitioner that the decision of the Supreme Court of Minnesota is contrary to the principles announced by this Court in the foregoing cases.

The question presented is of great and general importance, not only as it affects the propriety of prosecuting such actions against interstate carriers upon the Great Lakes in states over whose waters such carriers operate, but because of the growing importance of the question as it may involve interstate commerce by air, truck and bus.

Furthermore, this is a case directly within Rule 38 (former Rule 35) Section 5 (*a*), of the Rules of this Court, which indicates the character of reasons which will be considered by this Court for the allowance of a review on writ of certiorari, to wit:

> "Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

The scope and meaning of the decisions above cited should be determined and defined as applied to the situation

presented by this record and the question settled by this Court.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Minnesota, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in this case Number 29466 on its docket, including case Number 29814, entitled "International Milling Company, a corporation, appellant, *vs.* Columbia Transportation Company, respondent", and that such judgment of the Supreme Court of Minnesota may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just.

INTERNATIONAL MILLING COMPANY,
Petitioner.

By OSCAR MITCHELL,
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New York, N. Y.,
Of Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 561

INTERNATIONAL MILLING COMPANY,
A CORPORATION, PETITIONER,

vs.

COLUMBIA TRANSPORTATION COMPANY,
A CORPORATION, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The first appeal to the Supreme Court of Minnesota was from the order of the district court vacating and setting aside the service of the summons and a simultaneous levy under a writ of attachment. The opinion of the Minnesota Supreme Court is reported in 250 N. W. 186, and also appears, commencing on page 102*a*, in the record.

After the affirmance of this order, a judgment was entered in the trial court, from which a subsequent appeal was taken to the Supreme Court of Minnesota, the purpose

being to give finality to the decision. The *per curiam* opinion by which the Minnesota Supreme Court adheres to its former ruling is reported in 250 N. W. 186, and also appears in the record, commencing at page 115.

II.

Jurisdiction.

1. The date of the judgment to be reviewed, being that rendered by the Supreme Court of Minnesota, in the second appeal numbered 29814, from the final judgment of the District Court of St. Louis County, is October 17, 1933 (R. 116).

2. The specific claims advanced and rulings made in the lower court which are relied upon as the basis of this Court's jurisdiction are as follows:

After the service of the attachment and of the summons, the defendant, in the trial court, gave a bond for the release of the attachment, and, having secured such release, appeared specially and moved for an order setting aside the service of the summons and vacating the attachment on the grounds:

(*a*) That the levy of the attachment operated to place an unreasonable burden upon interstate commerce; and,

(*b*) That the service of the summons and prosecution of the action operated to place an unreasonable burden upon interstate commerce.

After a hearing, the trial court granted said motion upon the specific grounds above mentioned. This ruling having been affirmed by the Supreme Court of Minnesota, a judgment was entered in the lower court, which was affirmed by the Supreme Court of Minnesota, as above stated.

There was thus specially set up and claimed by the defendant a right, privilege or immunity under the Federal Constitution.

3. The statutory provisions under which the jurisdiction of this Court is invoked are Judicial Code, Sec. 237, as amended by Act of February 13, 1925, 43 Stat. 937, U. S. C. A., Title 28, Sec. 344.

4. Cases believed to sustain the jurisdiction of this Court are as follows:

Davis v. *Farmers Cooperative Co.*, 262 U. S. 312;
Atchison, T. & S. F. R. Co. v. *Wells*, 265 U. S. 101;
Missouri ex rel. St. Louis B. & M. R. Co. v. *Taylor*, 266 U. S. 200;
Hoffman v. *Missouri ex rel. Foraker*, 274 U. S. 21;
Michigan Central Railroad Co. v. *Mix*, 278 U. S. 492;
Denver & R. G. W. R. Co. v. *Terte*, 284 U. S. 284;

in all of which the jurisdiction of this Court was invoked by certiorari or by writ of error, to determine the question of whether or not the prosecution of the particular action involved operated to place an undue burden upon interstate commerce, in violation of the commerce clause of the Constitution.

III.

Statement of the Case.

In addition to the matters stated under section 1 of the petition herein (which in the interest of brevity are not here repeated), under the heading "Summary Statement of the Matter Involved", the following facts are important:

The business of the defendant is that of operating bulk freight steamers between various ports of the United States and between ports of the United States and Canada. It owns and operates ten freight steamers, loading and

unloading cargoes at Minnesota and other ports (R. 24). The business of the defendant is largely, if not entirely, interstate commerce; it maintains a representative in Duluth, Minnesota, who issues bills of lading and reports the movements of the several vessels to the defendant, and loads and unloads its vessels at termini within the State of Minnesota during the navigation season, and operates all of its vessels which touch Minnesota and Wisconsin ports, over approximately ninety miles of water over which the State of Minnesota has territorial jurisdiction.

IV.

Specification of Errors.

The following errors of the Supreme Court of Minnesota are assigned and specified as those intended to be urged:

In affirming the order of the district court granting defendant's motion to vacate and set aside the attachment and summons, and thereafter affirming the final judgment of the district court to the same effect, the Supreme Court of Minnesota erred in holding that the attachment and the service and levy thereof by the sheriff of St. Louis County on July 1, 1932, and the service of summons on the defendant by delivering a copy thereof to Otto Gentz on July 1, 1932, should be vacated and set aside on the ground that such service and the prosecution of said action in the District Court of Minnesota operate to place unreasonable conditions, burdens and restraints upon interstate commerce, in violation of the provisions of Article I, Section 8, subdivision 3, of the Constitution of the United States.

V.

ARGUMENT.

Summary of Argument.

Point A. A Federal question of substance and general importance is involved and this Court should take jurisdiction.

Point B. This is a suit:

1. By a foreign corporation qualified to do business within the state.

2. Against a defendant which is a foreign corporation not qualified to do business within the state, but which operates, in interstate commerce, a fleet of vessels over Minnesota waters.

3. On a cause of action which arose without the state.

Point C. The decision below is contrary to and in conflict with the principles applied by this Court in prior decisions, and the prosecution of the action in Minnesota does not constitute an undue burden upon interstate commerce.

Point A.

A Federal question of substance and general importance is involved and this Court should take jurisdiction.

This Court has had occasion to pass upon the general question here involved, in the six cases which are cited in the annexed petition. Three of them were decided upon certiorari and three upon writ of error. In each of them the question involved was whether the prosecution of the particular action was such a burden upon interstate commerce as to violate the commerce clause; and in each of them a railroad was involved.

The question here presented involves the applicability of the principles announced in these cases, to a carrier which does not operate upon rails. The increasing importance of interstate transportation by watercraft, airplane, bus and truck makes it important to have the law settled by the Court of final authority on this point.

It is and was the contention of the petitioner that the same principles should be applied to an interstate carrier which does not operate upon rails, as have been applied by this Court to interstate railway carriers. We feel that the question is of sufficient general importance to justify us in believing that this Court will take jurisdiction and apply the rules to the present situation which have been applied in the six cases referred to.

In discussing these six cases we shall also refer briefly to certain of the decisions of the Minnesota Supreme Court and other courts which support the principles here contended for, although it is, of course, recognized that these decisions are not in any manner controlling upon this Court.

Point B.

1. *This is a suit by a foreign corporation qualified to do business within the state.*

It is alleged in the complaint (R. 3) and not denied at any place in the record, that the plaintiff is a Delaware corporation having its principal place of business in Minnesota and that it is doing business in this state. The Minnesota Supreme Court assumed, and based its decision upon the assumption, that the plaintiff was duly qualified to do business within Minnesota. This assumption, which is conclusive so far as the present situation is concerned, was no doubt based upon the following decisions of the Minnesota Supreme Court, which hold that compliance with the

statute and due qualification to do business are presumed in the absence of evidence to the contrary:

Fidelity & Casualty Company of New York v. *Eikoff*, 63 Minn. 170, 65 N. W. 351;

Langworthy v. *Garding*, 74 Minn. 325, 77 N. W. 207;

State v. *Murphy*, 113 Minn. 405, 129 N. W. 850;

State ex rel. Miller v. *Reiter*, 140 Minn. 491, 178 N. W. 714.

Thus, in effect, the present suit is brought by a resident plaintiff, for the reason that a foreign corporation qualified and licensed to do business in this state has the same rights relative to the bringing of suits as a resident of the state and a domestic corporation.

G. Heileman Brewing Co. v. *Peimeisl*, 85 Minn. 121, 88 N. W. 441;

Thomas Mfg. Co. v. *Knapp*, 101 Minn. 432, 112 N. W. 989.

2. *This is a suit against a defendant which is a foreign corporation not qualified to do business within the state but which operates, in interstate commerce, a fleet of vessels over Minnesota waters.*

The Columbia Transportation Company, respondent here, is a Delaware corporation with its principal office in Wilmington, Delaware. It maintains an office for the transaction of business in Cleveland, Ohio (R. 23). It is not qualified to do business in the State of Minnesota (R. 24). It owns and operates ten freight steamers (R. 24), loading and unloading cargoes at Minnesota ports, and traverses approximately ninety miles over waters over which the State of Minnesota has territorial jurisdiction (R. 65).

As stated by Mr. Justice Loring in one of the dissenting opinions in the court below:

"Fortunately for the steamship line, it does not have to own right of way or trackage, but it does op-

erate its ships into waters and there dock, load and unload them. This it does with its own crews and employes just as much under its control as if it were operating a railway to convey the same goods or passengers. It brings its property within the state just as effectively and for the same purpose as does a railroad."

3. *This is a suit on a cause of action which arose without the state.*

The gist of the action (R. 3 ff.) is that about January 1, 1930, at South Chicago, Illinois, defendant stored for plaintiff in one of its ships, the "W. C. Richardson", a large cargo of wheat; that the grain was kept in storage until May, 1930, and then transported by defendant to Buffalo, New York; that it was in good order when delivered aboard the "Richardson", but that during the course of storage in South Chicago and transportation down to Buffalo, it was damaged through the negligence of the defendant, in the sum of approximately $20,000. The cause of action thus alleged arose without the State of Minnesota.

POINT C.

The decision below is contrary to and in conflict with the principles applied by this Court in prior decisions, and the prosecution of the action in Minnesota does not constitute an undue burden upon interstate commerce.

A bare majority of the Minnesota Supreme Court ignored or regarded as of no controlling importance, in determining whether this suit imposed an unreasonable burden on interstate commerce, the fact that the defendant here was operating its facilities regularly within the State of Minnesota, as surely as does a railroad.

The following analysis demonstrates clearly, we believe, that this Court, which is the final authority on the question,

regards the fact of operation or non-operation within the state as the key factor. In other words, all of the decisions of this Court hereinafter cited, as well as the decisions of other courts, clearly sustain the proposition that where the defendant is operating within the state, the prosecution of a transitory cause of action against it does not unreasonably burden interstate commerce, *irrespective of the residence of the plaintiff and irrespective of the place where the cause of action arose;* but, where the defendant is not operating within the state (and assuming jurisdiction has been obtained), the prosecution of such an action is an unreasonable burden upon interstate commerce, *unless* the cause of action arose within the state.

It will be noted that all of the cases hereinafter referred to come squarely within this principle and were decided in accordance therewith.

So, in the present case, where jurisdiction has been obtained by ancillary process and the defendant carries on regular operations within the state, even though its operations are interstate in character, the Minnesota Supreme Court should have held that there was no undue burden upon interstate commerce and should have permitted the plaintiff to utilize its home forum for the trial of this cause of action.

We refer briefly to the six cases decided by this Court and analyze them as follows:

Davis v. *Farmers Co-operative Company*, 262 U. S. 312, decided in 1923, was the first case to hold that the commerce clause of the Federal Constitution affects the question of the proper state for trial. In that case, a Kansas corporation brought suit in a state court of Minnesota, against the Director General as agent of the Santa Fe Railroad, another Kansas corporation, to recover for loss of grain in transit between two points in Kansas. The rail-

road did not own or operate a line in Minnesota, but it maintained an agent there for the solicitation of traffic. The State of Minnesota permitted service of process upon such an agent. This Court held this statute to be invalid as a violation of the commerce clause. Thus the doctrine was established that an unreasonable burden might be placed on interstate commerce by subjecting a carrier to legal proceedings in a state where it did not operate. In the *Davis* case, (*a*) plaintiff was a nonresident; (*b*) defendant was a nonresident; (*c*) defendant neither owned nor operated a railway within the state; (*d*) the cause of action arose outside of Minnesota.

This Court, in the *Davis* case, however, specifically points out that,

> "A foreign corporation engaged exclusively in interstate commerce is not, because of that fact, immune from the ordinary processes of the courts of a state where its business is entirely interstate in character, *International Harvester Co. v. Kentucky*, 234 U. S. 579. It must submit, as to jurisdiction, to the requirements of orderly, effective administration of justice, although thereby interstate commerce is incidentally burdened."

The present case differs from the *Davis* case in the following respects: (*a*) here the plaintiff, in contemplation of law, is a resident of the state, while in the *Davis* case the plaintiff was a nonresident; (*b*) in the present case, the defendant operates a line of vessels to Minnesota ports and over Minnesota waters, while in the *Davis* case it neither owned trackage nor operated within the state.

The next case decided by this Court was *Atchison, T. & S. F. R. Co.* v. *Wells*, 265 U. S. 101. The decision followed the *Davis* case for the reason that the controlling features were precisely similar to those in the *Davis* case.

The next case decided by this Court was *Missouri ex rel. St. Louis B. & M. R. Co.* v. *Taylor*, 266 U. S. 200. Here the plaintiff was a foreign corporation doing business in Missouri—in other words, a resident. The defendant was a Texas corporation not doing business in Missouri. The action was for damages to a shipment of goods deliverable in Missouri; and jurisdiction was acquired by garnishment of traffic balances due from an interstate carrier having a place of business in Missouri and, "for aught that appears" the negligence complained of occurred in Missouri. Under these circumstances, this Court held that the garnishment and prosecution of the action in Missouri did not unduly burden interstate commerce.

The main differences between the *Taylor* case and the present case are: (*a*) the defendant in the *Taylor* case did not operate within the state, while in the present case it does; and (*b*) in the Taylor case the cause of action was assumed to have arisen within the state, while in the present case it concededly arose without the state.

Still later this Court decided *Hoffman* v. *Missouri ex rel. Foraker*, 274 U. S. 21, which was an action in the State of Missouri, by a resident of Kansas, to recover for a wrongful death which occurred in Kansas, against a Missouri railroad. Under this state of facts, this Court held the burden not to be unreasonable.

The principal differences between the *Hoffman* case and the present case are as follows: (*a*) in the *Hoffman* case the plaintiff was a nonresident, while here it is a resident; (*b*) in the *Hoffman* case the defendant was a resident operating within the state, while here it is a nonresident operating within the state.

Next was decided *Michigan Central Railway Co.* v. *Mix*, 278 U. S. 492, in which the plaintiff was a resident of Michigan, who removed to Missouri after the cause of action accrued and before the suit was brought she became a resi-

dent of that state. The defendant was a Michigan corporation and the action was commenced in Missouri. The defendant railroad did not have a line in Missouri but maintained only a soliciting agent. The cause of action accrued in Michigan. The Court held the suit, under these circumstances, to be an unreasonable burden on interstate commerce.

Thus, the principal differences between the *Mix* case and the present case are: (*a*) in the *Mix* case the plaintiff was a nonresident of the state, who moved into the state after the cause of action accrued, while in the present case the plaintiff is a resident; and (*b*) in the *Mix* case, the defendant neither owned nor operated a line within the state, while in the present case the defendant operates a line of vessels to Minnesota ports and over Minnesota waters.

The latest case, so far as we know, to be decided by this Court, wherein the present question was involved, was *Denver & R. G. W. Ry. Co.*, v. *Terte*, 284 U. S. 284. The action was for damages under the Employers' Liability Act. The plaintiff was injured in Colorado but became a *bona fide* resident and citizen of Missouri after the cause of action arose. Negligence was charged jointly against the Santa Fe and the Rio Grande railroads. The Rio Grande was a Delaware corporation, neither owning nor operating a line in Missouri and not qualified to do business there, but maintaining an agent for traffic solicitation. The Santa Fe was a Kansas corporation, both owning and operating a line in Missouri and duly qualified to do business in Missouri. Jurisdiction of the Rio Grande was obtained by attachment. This Court held that the suit against the Santa Fe did not constitute an undue burden upon interstate commerce, but that the suit against the Rio Grande did.

Thus, we have the following differences between the *Terte* case and the present case: First, as to the Santa Fe: (*a*) in the *Terte* case the plaintiff became a resident of the

state after the cause of action arose, and in the present case the plaintiff is a resident; (*b*) in the *Terte* case the defendant Santa Fe was a resident, while in the present case the defendant is a nonresident. As to the Rio Grande, we have the same difference as to the party plaintiff and, in addition, the defendant Rio Grande neither owned nor operated a line within the state, whereas in the present case the defendant operates a line of vessels over Minnesota waters.

From the foregoing analysis, it is evident that this Court has not passed upon the precise situation here involved, where we have a suit (*a*) by a resident plaintiff, (*b*) against a foreign corporation, (*c*) operating in the state, (*d*) on a cause of action which arose outside the state. However, under this state of facts the Supreme Court of Arkansas held that there was no unreasonable burden upon interstate commerce, in *American Railway Express Co.*, v. *Rouw Co.*, 173 Ark. 710, 294 S. W. 401.

From the decisions of this Court there emerge certain general principles which appear to us to be clearly deducible. Those principles are as follows:

Where the defendant is operating within the state wherein a suit upon a transitory cause of action is brought, the prosecution of the action does not unduly burden interstate commerce, regardless of the residence of the plaintiff and regardless of where the cause of action arose; but where the defendant is not operating in the state and jurisdiction can be obtained, the cause of action must have arisen within the state or it is an undue burden upon interstate commerce.

This rule fits all of the cases decided by this Court, as well as the cases decided by other courts, including the Supreme Court of Minnesota.

It is clear that the mere question of convenience or inconvenience of transporting witnesses to the state where jurisdiction is sought is not controlling, for in the *Hoffman* case *supra*, witnesses were to be taken from Kansas to Missouri; and in the *Terte* case, *supra*, as to the Santa Fe, the witnesses were to be taken from Colorado to Missouri. In fact, this Court has expressly repudiated convenience or inconvenience of the parties as a determining factor by the following language from the *Terte* case:

> "Courts could not undertake to ascertain in advance of the trial the number and importance of probable witnesses within and without the state, and retain or refuse jurisdiction, according to the relative inconvenience of the parties."

The fact that the cause of action arose outside the state was not alone controlling in either the *Hoffman* case or the *Terte* case. Furthermore, in neither of those cases did the transaction out of which the cause of action arose take place in the state where the suit was brought. Yet in both cases the burden was held not to be unreasonable.

Again, in *Michigan Central* v. *Mix*, *supra*, and as to the Rio Grande in the *Terte* case, the residence of the plaintiff was not alone sufficient to eliminate the burden; nor was his nonresidence sufficient to impose it in the *Hoffman* case.

It would seem, therefore, that according to these decisions, the residence of a plaintiff in itself is immaterial as to the question of burden on interstate commerce, although in the present case, if any weight is given to it, such weight should be favorable to the plaintiff because it is a resident.

The inconvenience or convenience of witnesses cannot alone be controlling, because in the *Hoffman* case, even though witnesses were required from outside the state on a foreign cause of action, and even though securing the presence of those witnesses would greatly inconvenience

the carrier and cause expense probably as great as the inconvenience and expense in the *Davis* case, the court held that there was no burden on interstate commerce because the defendant operated in the State of Missouri. It is true that it was also incorporated in Missouri; but undoubtedly this was not considered important, as this factor could in no manner affect interstate commerce. It is no more burdensome to defend a suit where the interstate carrier is not incorporated than where it is incorporated, if the cause of action in both cases arose at a remote place.

An analysis of the above cited cases, and particularly of the *Terte* case, demonstrates that the ultimately controlling factor is the operation or non-operation of its facilities by the defendant within the state. As said by Mr. Justice Loring in his dissenting opinion in the court below:

> "In that case (the *Terte* case) an employe at an interlocking track and signal plant, after acquiring a *bona fide* residence in Missouri, sued, in that state, the Rio Grande Railroad and the Santa Fe, by both of which he had been employed, for injuries received in Colorado. The Santa Fe was a Kansas corporation licensed to operate its railroad in Missouri, whereas the Rio Grande operated no road in that state. Jurisdiction of the latter was sought by garnishment of traffic balances owed it by several railroad companies. It was held that a trial in Missouri would unreasonably burden interstate commerce as to the Rio Grande but not as to the Santa Fe. If the bringing of witnesses from Colorado were the controlling feature of the burden upon commerce, it was equally as burdensome for the Santa Fe as for the Rio Grande. Evidently we must look farther for the controlling distinction. The Santa Fe although a foreign corporation operated a railroad in Missouri. On the authority of *Hoffman* v. *Missouri ex rel. Foraker*, 273 U. S. 21, 71 L. Ed. 905, the court said the burden on the Santa Fe

was not unreasonable. Hoffman was a resident of Kansas suing a Missouri railroad for injuries received on its line in Kansas. One of the controlling considefations moving the Supreme Court to hold the burden not unreasonable was the operation of the defendant's road in Missouri. True it was a Missouri corporation, but the state of incorporation is not controlling, because in the *Ferte* case the Santa Fe was a nonresident, though licensed in Missouri. If the taking of witnesses from one state to another were the controlling consideration, the residence of the defendant would make no difference.

"*If any logical deduction can be drawn from the various cases, it seems to me that the operation of a railroad within the state where jurisdiction is sought is the important and controlling consideration.* So far as commerce is concerned, I cannot see the distinction between operating a railroad into a state, as did the Santa Fe in the *Terte* case, and operating a line of steamships into one of its ports as in the case at bar." (Italics ours.)

The situation including the reason for the rule is further tersely summed up by Mr. Justice Olson in his dissenting opinion, in which he says:

"I dissent on the ground that by the attachment of property within this state jurisdiction to the extent of such property was acquired and where a foreign corporation brings its property here and jurisdiction is acquired over it, the interference, if any, with interstate commerce is but incidental and in fact invited by the defendant. *Rosenblet* v. *Pere Marquette R. Co.*, 162 Minn. 55."

In the *Rosenblet* case last above cited, the appeal to the Minnesota Supreme Court was from an order denying the motion of the defendant to set aside the service of a summons, and denying a motion to vacate the attachment proceeding. The defendant was a foreign railroad cor-

poration not operating within the state. Plaintiff, a Minnesota resident, attempted to obtain jurisdiction by the service of summons on a soliciting freight agent of the defendant, who maintained an office in Minneapolis; but the court held that this was ineffectual, for the reason that the defendant was not doing business within the state, other than such interstate commerce business as is done by a soliciting agent and which, under the decision in the *Davis* case, it may do without subjecting itself to the jurisdiction of our courts.

However, the defendant had property within this state which was attached. This property was being used in the interstate business of the defendant. No claim was made of any irregularity in the attachment proceeding.

> "Hence," says the court, "under our statute jurisdiction has unquestionably been acquired of defendant to the extent of the value of the property attached, provided it is subject to attachment. This presents the sole question in the appeal."

It was the contention of the defendant in the *Rosenblet* case that since it was permissible for a foreign carrier of this kind to maintain its soliciting agent in Minnesota without thereby subjecting it to the jurisdiction of Minnesota courts, through service upon such agent, as held in the *Davis* case, the interference with the defendant's property by the attachment unreasonably burdened or interfered with interstate commerce. The Minnesota Supreme Court, in ruling contrary to this contention, makes the following statement:

> "That property is used in interstate commerce does not render it immune from seizure by attachment or garnishment was settled in *Davis* v. *Cleveland, C. C. & St. L. Ry. Co.*, 217 U. S. 157, 30 Sup. Ct. 463, 54 L. Ed. 708, 27 L. R. A. (N. S.) 823, 18 Ann. Cas. 907. But

> the use of such means of reaching a foreign carrier engaged in interstate commerce may or may not be a wrongful interference, depending upon the circumstances of the case. * * * This cause of action accrued in this state to a consignee of the shipment residing herein, and for which defendant is liable as initial carrier, under the Carmack amendment. The use of the writ of attachment to acquire jurisdiction of property of defendant to satisfy this cause of action cannot be a wrongful interference with interstate commerce. *With more propriety it may be said to be a proper use by the owner of property so transported to obtain redress against the wrongful acts of the carrier transporting the same.*" (Italics ours.)

That the Supreme Court of Minnesota has heretofore followed the principles which we contend for herein and which have been announced by this Court, is evidenced by the following decisions of the Minnesota Supreme Court, wherein the question of whether the particular action involved was an unreasonable burden on interstate commerce, was at issue.

State, ex rel. Schendel v. *District Court,* 156 Minn. 380, 194 N. W. 780;

Erving v. *Chicago & N. W. Railway Co.,* 171 Minn. 87, 214 N. W. 12;

Boright v. C., R. I. & P. Ry. Co., 180 Minn. 52, 230 N. W. 457.

Conclusion.

In view of the general importance of the question sought to be submitted to this Court, involving, as it does, a substantial Federal question which has been decided by the Minnesota Supreme Court contrary to the principles laid down by this Court, it is respectfully submitted that this case is one calling for the exercise by this Court of its

supervisory powers, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Minnesota Supreme Court and finally reverse it.

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STATUTES CITED

Constitution of Minnesota, Article II, Sec. 1	5
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Constitution of the United States, Article I, Sec. 8, Subd. 3	6, 7, 8
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Supreme Court of the United States

OCTOBER TERM, 1933.

No. 561

INTERNATIONAL MILLING COMPANY, *Petitioner,*

vs.

COLUMBIA TRANSPORTATION COMPANY, *Respondent.*

BRIEF OF PETITIONER

I.

THE OPINIONS OF THE COURT BELOW

The first appeal to the Supreme Court of Minnesota was from the order of the district court vacating and setting aside the service of the summons and simultaneous levy under a writ of attachment. The opinion of the Minnesota Supreme Court is reported in 250 N. W. 186 and also appears, commencing on page 67, in the record.

After the affirmance of this order, a judgment was entered in the trial court, from which a subsequent appeal was taken to the Supreme Court of Minnesota, the purpose being to give finality to the decision. The *per curiam* opinion by which the Minnesota Supreme Court adheres to its former ruling is reported in 250 N. W. 186, and also appears in the record, at page 80.

II.

JURISDICTION

1. The date of the judgment to be reviewed, being that rendered by the Supreme Court of Minnesota, in the second appeal numbered 29814, from the final judgment of the District Court of St. Louis County, is October 17, 1933 (R. 81).

2. The specific claims advanced and rulings made in the lower court which are relied upon as the basis of this Court's jurisdiction, are as follows:

After the service of the attachment and of the summons, the defendant, in the trial court, gave a bond for the release of the attachment and, having secured such release, appeared specially and moved for an order setting aside the service of the summons and vacating the attachment on the grounds:

(a) That the levy of the attachment operated to place an unreasonable burden upon interstate commerce; and,

(b) That the service of the summons and prosecution of the action operated to place an unreasonable burden upon interstate commerce.

After a hearing, the trial court granted said motion upon the specific grounds above mentioned. This ruling having been affirmed by the Supreme Court of Minnesota, a judgment was entered in the lower court, which was affirmed by the Supreme Court of Minnesota, as above stated.

There was thus specially set-up and claimed by the defendant a right, privilege or immunity under the Federal Constitution.

3. The statutory provisions under which the jurisdiction of this Court is invoked are Judicial Code, Sec. 237, as

amended by Act of February 13, 1925, 43 Stat. 937, U. S. C. A., Title 28, Sec. 344.

4. Cases believed to sustain the jurisdiction of this Court are as follows:

Davis v. Farmers Cooperative Co., 262 U. S. 312;

Atchison, T. & S. F. R. Co. v. Wells, 265 U. S. 101;

Missouri ex rel. St. Louis B. & M. R. Co. v. Taylor, 266 U. S. 200;

Hoffman v. Missouri ex rel. Foraker, 274 U. S. 21;

Michigan Central Railroad Co. v. Mix, 278 U. S. 492;

Denver & R. G. W. R. Co. v. Terte, 284 U. S. 284;

in all of which the jurisdiction of this Court was invoked by certiorari or by writ of error, to determine the question of whether or not the prosecution of the particular action involved operated to place an undue burden upon interstate commerce, in violation of the commerce clause of the Constitution.

III.

STATEMENT OF THE CASE

The cause comes before this Court upon certiorari granted December 11, 1933 (R. 83).

The proceeding is an action at law by International Milling Company, a Delaware corporation, duly qualified to do business in Minnesota, as plaintiff, against Columbia Transportation Company, a Delaware corporation not qualified to do business in Minnesota (but which operates its vessels in interstate commerce over Minnesota waters), as de-

fendant, to recover for damage to a cargo of wheat while stored in the steamer "W. C. Richardson" at South Chicago, Illinois, from about January 1, 1930 to May 1, 1930. Jurisdiction of the defendant to the extent of the property attached was acquired through the attachment of one of the vessels of the defendant company, the steamer "C. Russell Hubbard". (R. 8).

The business of the defendant is that of operating bulk freight steamers between various ports of the United States and between ports of the United States and Canada. It owns and operates ten freight steamers loading and unloading cargoes in Minnesota and other ports (R. 18-19). The business of the defendant is largely, if not entirely, interstate commerce; it maintains a representative in Duluth, Minnesota, who issues bills of lading and reports movements of the several vessels to the defendant, and loads and unloads its vessels at termini within the State of Minnesota during navigation season, and operates all of its vessels which touch the ports of Duluth, Minnesota and Superior, Wisconsin, over approximately ninety miles of water over which the State of Minnesota has territorial jurisdiction (R. 42).

It appears without dispute that the attachment and service of process was made while the vessel was upon waters over which the State of Minnesota has concurrent jurisdiction, pursuant to Article II, Section 2, of the Constitution of Minnesota, which reads as follows:

> "The State of Minnesota shall have concurrent jurisdiction on the Mississippi and over all rivers and waters bordering on the said State of Minnesota, so far as the same shall form a common boundary to said state, and any other state or states now or hereafter to be formed by the same; and said rivers and waters, and navigable waters leading into the same, shall be common highways and forever free, as well to the inhab-

itants of said state as to other citizens of the United States, without any tax, duty, impost, or toll therefor."

Boundaries of the state are fixed and determined by Section 1 of the same Article, which, in part, reads as follows:

"* * * thence east along the northern boundary of said state to the main channel of the Mississippi River; thence up the main channel of said river and following the boundary line of the State of Wisconsin until the same intersects the St. Louis River; thence down the said river to and through Lake Superior, on the boundary line of Wisconsin and Michigan, until it intersects the dividing line between the United States and British possessions; thence up Pigeon River and following said dividing line to the place of beginning."

Immediately after the levy and attachment and service of the summons and complaint, the defendant filed an undertaking in the sum of $40,000 (R. 9), for the release of the attachment; and the court thereupon ordered the attachment released (R. 11). The defendant, appearing specially, then secured an order to show cause (R. 11) why an order should not be made setting aside the attachment upon the following grounds:

1. That such an order had been previously entered in a case between the same parties, involving the same matter, and was therefore *res adjudicata*. This point was not discussed or referred to by the trial court in its order, nor by the Supreme Court of Minnesota in its opinion, and is not here involved.

2. That the service and levy of the attachment operated to place an unreasonable burden upon interstate commerce.

3. That the service of the summons and the prosecution of the action operated to place an unreasonable burden upon interstate commerce.

This motion, which was heard upon affidavits and oral testimony, was granted (R. 64), "on the ground and for the reason that said purported service and levy of attachment and purported service of summons in the main action and the prosecution of said action in this Court operate to place unreasonable conditions, burdens and restraints upon interstate commerce, in violation of the provisions of Article I, Section 8, subdivision 3 of the Constitution of the United States."

Upon appeal by the plaintiff to the Supreme Court of Minnesota, this order was affirmed by a divided court, three of the seven justices dissenting, said appeal being Docket No. 29466 in the Minnesota Supreme Court.

Thereafter judgment was entered in the trial court, from which a second appeal was taken for jurisdictional purposes, and resulted in affirmance of the judgment on the basis of the court's previous decision. This second appeal was No. 29814 on the docket of the Supreme Court of Minnesota.

A certified copy of the entire record of the case in the District Court of St. Louis County, Minnesota, and in the Supreme Court of Minnesota is before this Court, including both Appeal No. 29466 and Appeal No. 29814 in said Minnesota Supreme Court.

The sole question involved is whether the prosecution in Minnesota of a transitory cause of action by a foreign corporation duly qualified to do business within the state, against a foreign corporation not qualified to do business in the state, but which operates, in interstate commerce, a

fleet of vessels throughout the navigation season to and from Minnesota ports and upon waters over which the State of Minnesota has jurisdiction, upon a cause of action which arose without the State, and wherein jurisdiction was obtained by the attachment of property within the state to the extent of such property, imposes an unreasonable obstruction or undue burden upon interstate commerce, in violation of the commerce clause of the Constitution (Article I, Section 8, subdivision 3).

It was the contention of the petitioner that under the decisions of this Court no unreasonable burden was so imposed and that the cause was one which could be tried within the State of Minnesota without violation of the commerce clause.

The decisions upon which such reliance was placed are the following:

Davis v. Farmers Co-operative Co., 262 U. S. 312;
Atchison, T. & S. F. R. Co. v. Wells, 265 U. S. 101;
Missouri ex rel. St. Louis B. & M. R. Co. v. Taylor, 266 U. S. 200;
Hoffman v. Missouri ex rel. Foraker, 274 U. S. 21;
Michigan Central Railroad Co. v. Mix, 278 U. S. 492;
Denver & R. G. W. R. Co. v. Terte, 284 U. S. 284.

IV.

SPECIFICATION OF ERRORS

The following errors of the Supreme Court of Minnesota are assigned and specified as those intended to be urged:

In affirming the order of the district court granting defendant's motion to vacate and set aside the attachment and

summons, and thereafter affirming the final judgment of the district court to the same effect, the Supreme Court of Minnesota erred in holding that the attachment and the service and levy thereof by the sheriff of St. Louis County on July 1, 1932 and the service of summons on the defendant by delivering a copy thereof to Otto Gentz on July 1, 1932, should be vacated and set aside on the ground that such service and the prosecution of said action in the District Court of Minnesota operate to place unreasonable conditions, burdens and restraints upon interstate commerce, in violation of the provisions of Article I, Section 8, subdivision 3, of the Constitution of the United States.

V.

ARGUMENT

Summary of Argument

Point A. The decision below is contrary to and in conflict with the principles applied by this Court in prior decisions.

Point B. The service and levy of the attachment does not constitute an undue burden upon interstate commerce.

Point C. The prosecution of the action in Minnesota does not constitute an undue burden upon interstate commerce, because:

1. The defendant operates within the territorial jurisdiction of Minnesota;

2. The plaintiff is, in legal effect, a resident of Minnesota.

POINT A.

The decision below is contrary to and in conflict with the principles applied by this Court in prior decisions.

This is a suit by a foreign corporation qualified to do business within the State of Minnesota, against a defendant which is a foreign corporation not qualified to do business within the State of Minnesota but which operates in interstate commerce, a fleet of vessels over waters within the territorial jurisdiction of Minnesota, upon a transitory cause of action which arose without the State of Minnesota.

It is alleged in the complaint (R. 2) and not denied at any place in the record, that the plaintiff is a Delaware corporation having its principal place of business in Minnesota and that it is doing business in this state. The Minnesota Supreme Court assumed, and based its decision upon the assumption, that the plaintiff was duly qualified to do business within Minnesota. This assumption, which is conclusive so far as the present situation is concerned, was no doubt based upon the following decisions of the Minnesota Supreme Court, which hold that compliance with the statute and due qualification to do business are presumed in the absence of evidence to the contrary:

Fidelity & Casualty Company of New York v. Eickhoff, 63 Minn. 170, 65 N. W. 351;

Langworthy v. Garding, 74 Minn. 325, 77 N. W. 207;

State v. Murphy, 113 Minn. 405, 129 N. W. 850;

State ex rel. Miller v. Reiter, 140 Minn. 491, 168 N. W. 714.

In *State v. Murphy*, supra, the Supreme Court of Minnesota said:

"Compliance with our foreign corporation statutes will, in the absence of allegation or evidence to the contrary, be presumed."

In *Langworthy v. Garding, supra,* the same court said:

"While there has been some diversity of opinion on this subject in the different states, we believe the rule which applies to the acts of a private individual is the proper one to be applied to the acts of a corporation, whether foreign or domestic, and that it is to be presumed that all things are rightly done unless the circumstances of the case overturn the presumption. * * * We have not overlooked Solomon v. Dreschler, 4 Minn. 197 (278), which was practically followed in Olson v. Hurley, 33 Minn. 39, 21 N. W. 842; but we now hold that it was unnecessary for plaintiff, as part of his cause of action, to show that the insurance company had complied with the statute and had obtained a certificate of authority to transact business within our borders. Noncompliance with the law in reference to foreign corporations was a matter of defense."

In *Fidelity & Casualty Company of New York v. Eickhoff, supra,* the same court said:

"The first objection urged against the complaint is that it does not allege that the plaintiff had a license to do an insurance business in this state, as required by G. S. 1894, Sec. 3331. Notwithstanding that there would seem to be some decisions holding otherwise, we are of opinion that the case is one where the maxim '*Omnia rite acta praesumuntur*' is applicable. Noncompliance with the laws of this state will not be presumed, but, if it exists, must be set up in defense."

Furthermore, the Supreme Court of Minnesota in the present case has found and held that the plaintiff has a cor-

porate residence in Minnesota, as appears from the following quotation from the opinion (R. 69):

> "We do not forget that plaintiff has a corporate residence in Minnesota, or that, although a foreign corporation, its principal office is here."

Thus, in effect, the present suit is brought by a resident plaintiff, for the reason that a foreign corporation qualified and licensed to do business in this state has the same rights relative to the bringing of suits as a resident of the state and a domestic corporation.

G. Heileman Brewing Co. v. Peimeisl, 85 Minn. 121, 88 N. W. 441;

Thomas Mfg. Co. v. Knapp, 101 Minn. 432, 112 N. W. 989.

In *G. Heileman Brewing Co. v. Peimeisl, supra*, the Minnesota Supreme Court, in referring to the statutes of the state relative to the qualification of foreign corporations for pecuniary profit to transact business in this state, said:

> "This legislation is neither hostile nor unjust to foreign corporations, for its purpose is to place them on an equality with domestic corporations, both as to privileges and burdens; and it is the duty of the courts of the state to give those provisions full effect and not emasculate them by any technical construction."

This language is also cited with approval in the later case of *Thomas Mfg. Co. v. Knapp, supra.*

The Columbia Transportation Company, respondent here, is a Delaware corporation with its principal office in Wilmington, Delaware. It maintains an office for the transaction of business in Cleveland, Ohio (R. 15). It is not

qualified to do business in the State of Minnesota (R. 15). It owns and operates ten freight steamers (R. 15), loading and unloading cargoes at Minnesota ports, and traversing approximately ninety miles over waters over which the State of Minnesota has territorial jurisdiction (R. 42).

As stated by Mr. Justice Loring (R. 74) in one of the dissenting opinions in the court below:

> "Fortunately for the steamship line, it does not have to own right of way or trackage, but it does operate its ships into state waters and there dock, load and unload them. This it does with its own crews and employes just as much under its control as if it were operating a railway to convey the same goods or passengers. It brings its property within the state just as effectively and for the same purpose as does a railroad."

The gist of the action (R. 2 ff.) is that about January 1, 1930, at South Chicago, Illinois, defendant stored for plaintiff in one of its ships, the "W. C. Richardson", a large cargo of wheat; that the grain was kept in storage until May, 1930 and then transported by defendant to Buffalo, New York; that it was in good order when delivered aboard the "Richardson" but that during the course of storage in South Chicago and transportation down to Buffalo, it was damaged, through the negligence of the defendant, in the sum of approximately $20,000. The cause of action thus alleged arose without the State of Minnesota.

This Court has had occasion to pass upon the general question here involved in the six cases cited under Section II (4) of this brief. Three of them were decided upon certiorari and three upon writ of error. In each of them the question involved was, in ultimate effect, whether the prosecution of the particular action was such a burden upon interstate commerce as to violate the commerce clause; and in each of them a railroad was involved.

We refer briefly to these six cases and analyze them as follows:

Davis v. Farmers Co-operative Company, 262 U. S. 312, decided in 1923, was the first case to hold that the commerce clause of the Federal Constitution affects the question of the proper state for trial. In that case, a Kansas corporation brought suit in a state court of Minnesota, against the Director General as agent of the Santa Fe Railroad, another Kansas corporation, to recover for loss of grain in transit between two points in Kansas. The railroad did not own or operate a line in Minnesota; but it maintained an agent there for the solicitation of traffic. The State of Minnesota by statute permitted service of process upon such an agent. This Court held this statute to be invalid as a violation of the commerce clause. Thus the doctrine was established that an unreasonable burden might be placed on interstate commerce by subjecting a carrier to legal proceedings in a state where it did not operate. In the *Davis* case, (a) plaintiff was a nonresident; (b) defendant was a nonresident; (c) defendant neither owned nor operated a railway within the state; (d) the cause of action arose outside of Minnesota.

This Court, in the *Davis* case, however, specifically pointed out that,

pointed out that a foreign corporation engaged exclusively in interstate commerce is not, because of that fact, immune from the ordinary processes of the courts of a state where its busines is entirely interstate in character. Citing International Harvester Co. v. Kentucky, 234 U. S. 579. It must submit, as to jurisdiction, to the requirements of orderly, effective administration of justice, although thereby interstate commerce is incidentally burdened.

The present case differs from the *Davis* case in the following respects: (a) here the plaintiff, in contemplation of

law, is a resident of the state, while in the *Davis* case the plaintiff was a nonresident; (b) in the present case, the defendant operates a line of vessels to Minnesota ports and over Minnesota waters, while in the *Davis* case it neither owned trackage nor operated within the state.

The next case decided by this Court was *Atchison, T. & S. F. R. Co. v. Wells*, 265 U. S. 101. The decision followed the *Davis* case for the reason that the controlling features were precisely similar to those in the *Davis* case.

The next case decided by this Court was *Missouri ex rel. St. Louis B. & M. R. Co. v. Taylor*, 266 U. S. 200. Here the plaintiff was a foreign corporation doing business in Missouri—in other words, a resident. The defendant was a Texas corporation not doing business in Missouri. The action was for damages to a shipment of goods deliverable in Missouri; and jurisdiction was acquired by garnishment of traffic balances due from an interstate carrier having a place of business in Missouri and, "for aught that appears" the negligence complained of occurred in Missouri. Under these circumstances, this Court held that the garnishment and prosecution of the action in Missouri did not unduly burden interstate commerce.

The main differences between the *Taylor* case and the present case are: (a) the defendant in the *Taylor* case did not operate within the state, while in the present case it does; and (b) in the *Taylor* case the cause of action was assumed to have arisen within the state, while in the present case it concededly arose without the state.

Still later this Court decided *Hoffman v. Missouri ex rel. Foraker*, 274 U. S. 21, which was an action in the State of Missouri, by a resident of Kansas, to recover for a wrongful death which occurred in Kansas, against a Missouri railroad. Under this state of facts, this Court held the burden not to be unreasonable.

The principal differences between the *Hoffman* case and the present case are as follows: (a) in the *Hoffman* case the plaintiff was a nonresident, while here it is a resident; (b) in the *Hoffman* case the defendant was a resident operating within the state, while here it is a nonresident operating within the state.

Next was decided *Michigan Central Railway Co. v. Mix*, 278 U. S. 492, in which the plaintiff was a resident of Michigan, who removed to Missouri after the cause of action accrued; and before the suit was brought she became a resident of that state. The defendant was a Michigan corporation and the action was commenced in Missouri. The defendant railroad did not have a line in Missouri but maintained only a soliciting agent. The cause of action accrued in Michigan. The Court held the suit, under these circumstances, to be an unreasonable burden on interstate commerce.

Thus, the principal differences between the *Mix* case and the present case are: (a) in the *Mix* case the plaintiff was a nonresident of the state, who moved into the state after the cause of action accrued, while in the present case the plaintiff is a resident; and (b) in the *Mix* case, the defendant neither owned nor operated a line within the state, while in the present case the defendant operates a line of vessels to Minnesota ports and over Minnesota waters.

The latest case, so far as we know, to be decided by this Court, wherein the present question was involved, was *Denver and R. G. W. Ry. Co. v. Terte*, 284 U. S. 284. The action was brought in Missouri for damages under the Employers' Liability Act. The plaintiff was injured in Colorado but became a bona fide resident and citizen of Missouri after the cause of action arose. Negligence was charged jointly against the Santa Fe and the Rio Grande railroads. The Rio Grande was a Delaware corporation, neither owning nor

operating a line in Missouri and not qualified to do business there, but maintaining an agent for traffic solicitation. The Santa Fe was a Kansas corporation, both owning and operting a line in Missouri and duly qualified to do business in Missouri. Jurisdiction of the Rio Grande was obtained by attachment. This Court held that the suit against the Santa Fe did not constitute an undue burden upon interstate commerce, but that the suit against the Rio Grande did.

Thus, we have the following differences between the *Terte* case and the present case: first, as to the Santa Fe: (a) in the *Terte* case the plaintiff became a resident of the state after the cause of action arose and, in the present case, the plaintiff was at all times a resident; (b) in the *Terte* case the defendant Santa Fe was a resident, while in the present case the defendant is a nonresident, operating its facilities within the state in interstate commerce. As to the Rio Grande, we have the same difference as to the party plaintiff and, in addition, the defendant Rio Grande neither owned nor operated a line within the state, whereas in the present case the defendant operates a line of vessels over Minnesota waters.

From the foregoing analysis, it is evident that this Court has not passed upon the precise situation here involved, where we have a suit (a) by a resident plaintiff, (b) against a foreign corporation, (c) operating in the state in interstate commerce, (d) on a cause of action which arose outside the state.

From the decisions of this Court the following general principle would appear to be applicable:

Assuming jurisdiction can be obtained, where the defendant is operating within the state wherein a suit upon a transitory cause of action is brought, the prosecution of the action does not unduly burden interstate commerce, regardless of the residence of the plaintiff and regardless of where

the cause of action arose; but where the defendant is not operating in the state, the cause of action must have arisen within the state or it is an undue burden upon interstate commerce.

While it may not be possible or even desirable to lay down a rigid rule applicable to all cases, it is, nevertheless, true that if any general principle is deducible from the cases already considered by this Court, it is expressed in the foregoing.

The problem is well expressed by Mr. Chief Justice Rugg, of the Massachusetts Supreme Judicial Court, in *Cressey v. Erie R. Co.*, 278 Mass. 284, 180 N. E. 160 (hereinafter referred to) where he says:

> "The problem is to balance the interests of individuals in the enforcement of private rights, on the one side, against the interests of the public as a whole in untrammeled and efficient interstate transportation on the other side."

POINT B.

The service and levy of the attachment does not constitute an undue burden on interstate commerce.

The prevailing opinion in the court below did not differentiate between (a) service and levy of the attachment and (b) the trial of the action; although the order of the trial court, which was affirmed, set aside the service and levy of the attachment *and* the service of the summons as operating to place unreasonable burdens upon interstate commerce.

We do not believe it will be seriously contended that the service and levy of the attachment in and of itself is an un-

due burden upon interstate commerce because, as this Court said in the *Terte* case, 284 U. S. 284, 287:

> "Obviously, the burden and expense which the carrier must incur in order to make defense in a state where the accident did not occur has no relation to the nature of the process used to bring it before the court."

In the *Taylor* case, supra, jurisdiction was obtained solely by reason of the garnishment of traffic balances due from a connecting interstate carrier having a place of business in Missouri. As to this the Court said on page 207 of the opinion:

> "To require that, under such circumstances (as existed in the *Taylor* case) the foreign carrier shall submit to suit within a state to whose jurisdiction it would otherwise be amenable by process of attachment, does not unreasonably burden interstate commerce."

It seems reasonably clear, therefore, that if the action itself is properly triable within a given state, the mere fact that jurisdiction must be obtained by attaching property which is used in interstate commerce is not of itself a matter of importance. In the present case, therefore, if the trial of the action brought by a resident plaintiff against a defendant regularly bringing its facilities and property within the territorial jurisdiction of Minnesota, does not operate to place an unreasonable burden on interstate commerce, then the fact that jurisdiction of that defendant was obtained by attachment of property used in interstate commerce must be considered in the light suggested by the dissenting opinion of Mr. Justice Olson in the court below, where he says:

> "I dissent on the ground that by the attachment of property within this state jurisdiction to the extent of

such property was acquired and where a foreign corporation brings its property here and jurisdiction is acquired over it, the interference, if any, with interstate commerce is but incidental and in fact invited by the defendant. Rosenblet v. Pere Marquette R. Co., 162 Minn. 55."

The correctness of this is further borne out by the statement of this Court in the *Davis* case, to the effect that the mere circumstance that property is used in interstate commerce does not render it imune from seizure by attachment or garnishment, in support of which statement this Court cited *Davis v. Cleveland C. C. & St. L. Co.*, 217 U. S. 157, although the statement is qualified by the further statement that the use of such means of reaching a foreign carrier engaged in interstate commerce may or may not be a wrongful interference, depending upon the circumstances of the case.

As a practical matter, there was no substantial delay or burden caused by the attachment here which was released on bond within a very few hours.

In *Davis v. Cleveland*, supra, this Court passed upon the question here under consideration under the following circumstances: The plaintiff brought an action in Iowa against the defendant railway company, an Indiana corporation. The plaintiff was a citizen of Iowa. Jurisdiction was obtained by levy and attachment upon freight cars found within the State of Iowa, which defendant claimed were engaged at the time in interstate commerce. The defendant, appearing specially, filed a motion to set aside the attachment, on the ground that it unreasonably burdened interstate commerce. The lower court granted the motion; and in reversing this decision and holding that there was no undue burden on interstate commerce by the attachment, this Court says:

"The state may pass laws enforcing the rights of its citizens, which affect interstate commerce but fall short of regulating such commerce in the sense in which the Constitution gives exclusive jurisdiction to Congress. (Citing cases). The interference with interstate commerce by the enforcement of the attachment laws of a state must not be exaggerated. It can only be occasional and temporary. The obligations of a railway company are tolerably certain and provisions for them can be easily made. Their sudden assertion can be almost instantly met; at any rate, after a short delay and without much, if any, embarrassment, to the continuity of transportation."

These statements are clearly applicable to the case at bar.

In *Iroquois Transportation Co. v. Delaney Forge & Iron Co.*, 205 U. S. 354, the facts were that a vessel was partially constructed at Detroit, and then taken to Loraine, Ohio, where the work was completed. She was afterwards engaged in carrying cargoes between points on Lake Erie and Lake Superior. She did not stop at Detroit. The plaintiff having performed certain work on the vessel and claiming a lien, attached the vessel on a trip while she was passing Detroit, on process issued out of the courts of Wayne County, Michigan. The boat was in the Detroit River, with Michigan on one side and Canada on the other.

The Iroquois Company gave a bond under the statute for the release of the vessel. In upholding the right to attach the vessel under such circumstances, this Court said:

"It is urged that the attempt to enforce the lien on the vessel was while she was engaged in interstate commerce, and therefore proceedings against her were unlawful and void in view of the exclusive control of this subject by Congress under the Constitution and Laws of the United States. But it must be remembered that,

concerning contracts not maritime in their nature, the state has authority to make laws and enforce liens, and it is no valid objection that the enforcement of such laws may prevent or obstruct the prosecution of a voyage of an interstate character. The laws of states enforcing attachment and execution in cases cognizable in state courts have been sustained and upheld."

These cases, we believe, demonstrate that if the action is one which is properly cognizable by the courts of a given state, and if the prosecution of the action does not unreasonably restrain or burden interstate commerce, then the laws of that state giving the right of attachment to obtain jurisdiction to the extent of the property attached should be sustained, even though the property attached is being used in interstate commerce.

We therefore proceed to a consideration of the question of whether, under the six decisions of this Court upon this subject, the prosecution of the action in Minnesota will unduly and unreasonably burden interstate commerce.

POINT C.

1. The prosecution of an action in Minnesota does not constitute an undue burden upon interstate commerce, because the defendant operates within the territorial jurisdicion of Minnesota.

Four of the seven Justices of the Minnesota Supreme Court ignored, or regarded as of no controlling importance, in determining whether this suit imposed an unreasonable burden on interstate commerce, the fact that the defendant here was operating its facilities regularly within the State of Minnesota, as surely as does a railroad.

The foregoing analysis demonstrates clearly, we believe, that this Court, which is the final authority on the question, regards the fact of operation or non-operation within the state as the key factor. In other words, all of the decisions of this Court above cited, as well as the decisions of other courts, sustain the proposition that where the defendant is operating within the state, the prosecution of a transitory cause of action against it does not unreasonably burden interstate commerce, *irrespective of the residence of the plaintiff and irrespective of the place where the cause of action arose*; but, where the defendant is not operating within the state (and assuming jurisdiction can be obtained), the prosecution of such an action is an unreasonable burden upon interstate commerce, *unless* the cause of action arose within the state.

So, in the present case, where jurisdiction has been obtained by ancillary process and the defendant carries on regular operations within the state, even though its operations are interstate in character, the Minnesota Supreme Court should have held that there was no undue burden upon interstate commerce and should have permitted the trial of this cause of action.

It is clear that the mere question of convenience or inconvenience of transporting witnesses to the state where jurisdiction is sought is not alone controlling, for in the *Hoffman* case, supra, witnesses were to be taken from Kansas to Missouri; and in the *Terte* case, supra, as to the Santa Fe, the witnesses were to be taken from Colorado to Missouri. In fact, this Court has expressly repudiated convenience or inconvenience of the parties as a determining factor by the following language from the *Terte* case:

> "Courts could not undertake to ascertain in advance of the trial the number and importance of prob-

able witnesses within and without the state, and retain or refuse jurisdiction, according to the relative inconvenience of the parties."

In the *Hoffman* case, even though witnseses were required from outside the state on a foreign cause of action and even though securing the presence of those witnesses would as greatly inconvenience the carrier and cause expense probably as great as the inconvenience and expense in the *Davis* case, this Court held that there was no burden on interstate commerce because the defendant operated in the State of Missouri. It is true that it was also incorporated in Missouri; but undoubtedly this was not considered important, as this factor could in no manner affect interstate commerce. It is no more burdensome to defend a suit where the interstate carrier is not incorporated than where it is incorporated, if the cause of action in both cases arose at a remote place.

The fact that the cause of action arose outside the state was not alone controlling in either the *Hoffman* case or (as to the Santa Fe) the *Terte* case. In neither of those cases did the transaction out of which the cause of action arose take place in the state where the suit was brought. Yet in both cases the burden was held not to be unreasonable.

Again, in *Michigan Central v. Mix*, supra, and as to the Rio Grande in the *Terte* case, the residence of the plaintiff, acquired *after the cause of action arose*, was not alone sufficient to eliminate the burden; nor was his nonresidence sufficient to impose it in the *Hoffman* case.

An analysis of the six decisions of this Court, and particularly of that in the *Terte* case, demonstrates that the ultimately controlling factor is the operation or non-operation of its facilities by the defendant within the state. Our

position as to this is adequately set forth by Mr. Justice Loring (R. 73-74) in his dissenting opinion in the court below:

> "In that case (the *Terte* case) an employe at an interlocking track and signal plant, after acquiring a bona fide residence in Missouri, sued, in that state, the Rio Grande Railroad and the Santa Fe, by both of which he had been employed, for injuries received in Colorado. The Santa Fe was a Kansas corporation licensed to operate its railroad in Missouri, whereas the Rio Grande operated no road in that state. Jurisdiction of the latter was sought by garnishment of traffic balances owed it by several railroad companies. It was held that a trial in Missouri would unreasonably burden interstate commerce as to the Rio Grande but not as to the Santa Fe. If the bringing of witnesses from Colorado were the controlling feature of the burden upon commerce, it was equally as burdensome for the Santa Fe as for the Rio Grande. Evidently we must look farther for the controlling distinction. The Santa Fe although a foreign corporation operated a railroad in Missouri. On the authority of Hoffman v. Missouri ex rel. Foraker, 273 U. S. 21, 71 L. Ed. 905, the court said the burden on the Santa Fe was not unreasonable. Hoffman was a resident of Kansas suing a Missouri railroad for injuries received on its line in Kansas. One of the controlling considerations moving the Supreme Court to hold the burden not unreasonable was the operation of the defendant's road in Missouri. True it was a Missouri corporation, but the state of incorporation is not controlling, because in the *Terte* case the Santa Fe was a nonresident, though licensed in Missouri. If the taking of witnesses from one state to another were the controlling consideration, the residence of the defendant would make no difference.
>
> "*If any logical deduction can be drawn from the various cases, it seems to me that the operation of a railroad within the state where jurisdiction is sought is the important and controlling consideration.* So far as

commerce is concerned, I cannot see the distinction between operating a railroad into a state, as did the Santa Fe in the *Terte* case, and operating a line of steamships into one of its ports as in the case at bar." (Italics ours.)

The fact that such operation of the defendant's facilities is wholly in interstate commerce does not change the situation because, as this Court said in the *Davis* case:

> "The fact that the business carried on by a corporation is entirely interstate in character does not render the corporation immune from the ordinary process of the courts of a state. International Harvester Co. v. Kentucky, 234 U. S. 579, 58 L. Ed. 1479, 34 Sup. Ct. Rep. 944. The requirements of orderly, effective administration of justice are paramount."

2. The prosecution of the action in Minnesota does not constitute an undue burden upon interstate commerce because the plaintiff is, in legal effect, a resident of Minnesota.

In the foregoing discussion it may be that we have not attached sufficient importance to the fact that the plaintiff, in contemplation of law, is a resident of the State of Minnesota.

That the plaintiff here is a resident cannot be successfully controverted, as we have shown above. This position is in accord with the statement of this Court in the *Taylor* case, supra, where the plaintiff, The American Fruit Growers, Inc., was a Delaware corporation, "with a usual place of business in Missouri.". As to this, the Court said (266 U. S. 200, 207):

> "Here *the plaintiff consignee is a resident of Missouri,*—that is, has a usual place of business within the State;" (Italics ours).

In the majority opinion below, the court said, in regard to this element (R. 69-70):

> "We do not forget that plaintiff has a corporate residence in Minnesota, or that, although a foreign corporation, its principal office is here. That circumstance tends to reduce its unreasonableness, but it does not at all lessen the burden to interstate commerce which would result from the prosecution of this action in Minnesota."

However, this Court said, in the *Davis* case:

> "It may be that a statute like that here assailed would be valid although applied to suits in which the cause of action arose elsewhere, if the transaction out of which it arose had been entered upon within the state, *or if the plaintiff was, when it arose, a resident of the state.* These questions are not before us and we express no opinion upon them." (Italics ours).

Although the last quotation is dictum, it has in all probability impelled some courts to consider the question of the plaintiff's residence as a matter of very considerable importance.

Cressey v. Erie R. Co., 278 Mass. 284, 180 N. E. 160.

Johnston v. Atlantic Coastline R. Co., 128 Misc. Rep., 82, 217 N. Y. S. 758.

Griffin v. Seaboard Airline Ry. Co., (D. C. Mo.) 28 Fed. 2d, 998.

American Railway Express Co. v. Rouw Co., 173 Ark. 710, 294 S. W. 401.

In this connection we note that in the *Mix* case and in the *Terte* case the plaintiff's residence in the state was ac-

quired before suit but *after the cause of action had arisen,* which this Court held was not sufficient to remove the burden upon interstate commerce.

While it is not specifically so stated, it is altogether possible that the plaintiff's change of his residence after the cause of action arose and before the bringing of his suit, might have been for the mere purpose of seeking a more favorable forum, which fact, naturally, should not be of sufficient importance to weigh against the inconvenience of the carrier and the resulting burden on interstate commerce.

As the Court said in *Cressey v. Erie R. Co.,* supra:

> "The problem is to balance the interests of individuals in enforcement of private rights, on the one side, against the interests of the public as a whole in untrammeled and efficient interstate transportation on the other side.
>
> * * *
>
> "In general one has a right to seek redress of his grievances in the forum of his domicil, provided the courts of his domicil can secure jurisdiction over his adversary. The plaintiff is not making use of the courts of his domicil to secure any advantage over the defendant. The maintenance of an action in our courts will not cause any greater interference with interstate commerce than was held to be permissable in Hoffman v. Missouri ex rel. Foraker, 274 U. S. 21, 47 S. C. 485, 71 L. Ed. 905, where the plaintiff left the state of his own domicil, in which the cause of acton arose, to bring suit in the state of the domicil of the defendant, to the inconvenience of the latter. We think that the trend of the decisions already reviewed favors the contention of the plaintiff. This conclusion finds support in the decisions of some inferior federal courts. Maverick Mills v. Davis, (D. C.) 294 Fed. 404; Griffin v. Seaboard Airline Ry. (D. C.) 28 Fed. 2d, 998; id., (D. C.) 38 Fed.

2d, 98. It is in accord with Reynolds v. Missouri, Kansas & Texas Ry., 228 Mass. 584, 588, 117 N. E. 913; Martin v. West, 222 U. S. 191, 32 S. C. 42, 56 L. Ed. 159, 36 L. R. A. (NS.) 592.

> "On principle we think that the right and convenience of the plaintiff to maintain the action in the courts of his domicil outweigh the inconvenience to interstate commerce which may result from the presentation of its defense in the courts of this commonwealth by the defendant. The plaintiff's cause of action against the defendant is his property. * * * To compel him to leave the courts of his domicil, where he has secured by attachment property of the defendant, and thus to that extent jurisdiction over the defendant, to go to a foreign state to prosecute that cause of action with the added expense and inconvenience, savors of deprivation of property without due process of law. These factors in conceivable cases might be such an obstacle to a plaintiff as to prevent any attempt to enforce his cause of action. While not theoretically taken away, the cause of action might be so hedged with burdens touching its enforcement as to render it practically much reduced in value. * * * * Accepting the test that the 'requirements of orderly, effective administration of justice are paramount' (262 U. S. 316, 43 S. C. 556, 558, 67 L. Ed., 996), we think that the plaintiff is entitled to prosecute the present action."

In the *Cressey* case, from which the foregoing has been quoted, the plaintiff was a resident of Massachusetts. The defendant was a foreign corporation, having no agent or place of business within that state. The action was on contract to recover the value of a car of hay alleged to have been sold wrongfully and against the rights of the plaintiff by the defendant, to pay freight and demurrage charges. The defendant appeared specially and filed a motion to dismiss the action for the reason that the prosecution of the action "is an unreasonable burden on interstate commerce, that the

statute allowing the attachment of property in this commonwealth is void so far as applicable to this case, and that therefore the court is without jurisdiction."

The cause of action arose in Georgia. Jurisdiction (to the extent of the property attached) was obtained by attachment of funds which arose out of interstate commerce transactions and balances.

It is thus seen that the *Cressey* case is, in effect, precisely like this case at bar; and if the Massachusetts Supreme Court is correct in its conclusion that the residence of the plaintiff within the state is a controlling element, the same feature would apply with greater force in the case at bar because, in addition, we have here a defendant which actually brings its property within the state, makes use of its terminal facilities and traverses its territorial waters.

To use the language of this Court in the *Taylor* case, as it was applied to a foreign corporation doing business in Missouri, the plaintiff here is a resident of Minnesota—that is, has a usual place of business within the state. Furthermore, it was such *at the time the cause of action arose,* and it should, therefore, not be precluded from seeking relief in the courts of the state of its residence, even though interstate commerce thus might incidentally be burdened to a slight extent.

CONCLUSION

Although it appears clearly from the six decisions of this Court, which have been discussed in this brief, that the operation of the defendant's facilities within the state where jurisdiction is sought is the important and controlling factor, in determining whether the prosecution of a suit such as this constitutes an unreasonable burden upon interstate

commerce, we feel justified, from the dictum in *Davis v. Farmers Cooperative Co.*, above referred to, in believing that this Court may also consider the fact that the plaintiff is a resident of the state as a factor in its favor. The arguments of the Massachusetts Supreme Court in *Cressey v. Erie R. Co.*, supra, seem to us to be logical and unanswerable; and if this Court regards either one or both of these factors as controlling as to the reasonableness of the burden upon interstate commerce, the judgment of the court below must be reversed.

It is, therefore, respectfully submitted that the plaintiff, a resident of Minnesota, should not be deprived of the use of what, in legal effect, is its home forum, even though the defendant's operations in Minnesota are interstate in character; and that the interests of justice, as well as the decided cases of this Court, require that the judgment of the Minnesota Supreme Court be reversed.

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Supreme Court of the United States

OCTOBER TERM, 1928

No. 561

INTERNATIONAL MILLING COMPANY, Petitioner,

vs.

COLUMBIA TRANSPORTATION COMPANY,

Respondent.

Brief and Argument for Respondent in Opposition to Petition for Writ of Certiorari.

[redacted]

[redacted]

Counsel for Respondent.

[redacted]

[redacted]

[redacted]

[redacted]

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[redacted]

Of Counsel for Respondent.

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Supreme Court of the United States

OCTOBER TERM, 1933

No. 561

INTERNATIONAL MILLING COMPANY, PETITIONER,

vs.

COLUMBIA TRANSPORTATION COMPANY,

RESPONDENT.

Brief and Argument for Respondent in Opposition to Petition for Writ of Certiorari.

Statement of Facts

Both petitioner, plaintiff, below, and respondent, defendant, below, are foreign corporations, not resident in Minnesota. Respondent neither owns nor operates any property in Minnesota, carries on no activities in the State except those incidental to transportation of cargoes by water in interstate business (Rec. Fol. 72-3), maintains no office in the State, has no agent in the State, and navigates its vessels upon the Great Lakes to ports of Minnesota only over navigable waters of the United States.

On or about December 4th, 1930, petitioner filed a libel in admiralty in the United States District Court at

Buffalo *in rem* against the Steamer "W. C. Richardson," then owned by Columbia Steamship Company, predecessor of respondent, seeking to recover the same damages, arising out of the same cause of action as that involved in the present case. The "Richardson" was seized and duly released by the filing of a bond. Exceptions were filed to the libel, which exceptions were sustained, the libelant being given twenty days within which to amend, and the case was dismissed at libelant's cost when no amended libel was filed.

During the pendency of the proceeding in the Admiralty Court at Buffalo libelant's attorneys inquired whether the Columbia Steamship Company would enter appearance and defend in an action to recover for said alleged damages to be brought at law in State or Federal Court at Buffalo (R. 97). On or about February 4th, 1931, the Columbia Steamship Company, by its attorneys, agreed that it would enter appearance and defend in an action at law to be brought in United States District Court at Buffalo. Such action was never instituted but the next proceeding was a suit brought by Chance W. Clark, a citizen of Ohio, as assignee of petitioner in the District Court of St. Louis County, Minnesota, at Duluth, against the Columbia Steamship Company, an Ohio corporation. A summons was served upon the Captain of the Steamship "Harvey D Goulder," and the steamer seized under writ of attachment levied on August 18th, 1931. The ship was released upon the filing of bond. The service of process and the writ of attachment were vacated for the reason that to allow the action to proceed would have operated to place an unreasonable condition, burden and restraint on interstate commerce. No appeal was taken from the order of the District Court (R. 100-107).

The present suit was instituted by the International Milling Company, a Delaware corporation, to whom the cause of action herein involved presumably was reassigned by Chance W. Clark. Purported service of summons was made upon the Captain of the "C. Russell Hubbard," a ship owned by respondent, and writ of attachment was levied upon said vessel while moored at a dock at Allouez, Wisconsin, and being unloaded by the dock crew (R. 63). The steamer was released upon the filing of bond. The District Court granted the motion of the defendant for the vacating of the service of process and levy of attachment, following the ruling of the same court, by a different judge, in the previous case brought by Clark (R. 293).

The Supreme Court of Minnesota sustained that order. 250 N. W., 186, 190.

Argument

Preliminary

The decisions upon which respondent primarily relies are:

Davis v. Farmers Co-operative Co., 262 U. S. 312;

Atchison T. & S. F. R. Co. v. Wells, 265 U. S. 101;

Texas Transport & Terminal Co. v. City of New Orleans, 264 U. S. 150;

Di Santo v. Pennsylvania, 273 U. S. 34;

Michigan Central R. R. Co. v. Mix, 278 U. S. 492;

Denver & R. G. W. R. Co. v. Terte, 284 U. S. 284.

Petitioner's brief makes it clear that, for the allowance of the writ it relies upon the ground stated within Rule 38 (former Rule 35) Section 5 (a) of the Rules of this court, contending that the decision of the State Court herein is the decision of a federal question of substance not heretofore determined by this court.

The cases above cited upon which respondent relies clearly establish that this court has decided the federal question here involved upon facts in which the legal position of the parties was in substance exactly the same as the position of the parties in this case.

I.

Prior decisions of this court have decided the Federal question here involved and the conclusion of the Supreme Court of Minnesota in this proceeding follows those decisions.

Davis v. Farmers Co-op. Co., 262 U. S. 312, was an action by a Kansas corporation in a court of Minnesota for recovery for loss of grain shipped under a bill of lading issued by the carrier in Kansas for transportation over its line from one point in that state to another. The transaction was in no way connected with Minnesota. The carrier did not own or operate any railroad in Minnesota, but it maintained there an agent for solicitation of traffic. A Minnesota Statute permitted service of process upon an agent maintained in this state by a foreign railroad to solicit business for transportation over its lines in other states in suits which might arise out of transactions in other states in favor of non-residents of the state. The statute was held invalid as a violation of

the Commerce Clause of the Federal Constitution. In this case the court says (p. 315):

> "That the claims against interstate carriers for personal injuries and for loss and damage of freight are numerous; and that the amounts demanded are large; that in many cases carriers deem it imperative or advisable to leave the determination of their liability to the courts; this litigation in states and jurisdictions remote from that in which the cause of action arose entails absence of employees from their customary occupations; and that this impairs efficiency in operation, and causes, directly and indirectly, heavy expense to the carriers; these are matters of common knowledge."

Atchison, Topeka & Santa Fe Ry. Co. v. Wells, 265 U. S. 101, was a case in which Wells, a resident of Colorado, was injured in New Mexico, while employed by the railway company. He sued in Texas, without personal service, and garnisheed rolling stock of the Santa Fe in the possession of and traffic balances owed to the Santa Fe by a Texas railroad. The judgment was for the plaintiff Wells in the state court, and suit was brought to enjoin enforcement of that judgment.

The Santa Fe Railway was not doing business in Texas. The writ and the judgment based thereon were held void by this Court not because the rolling stock was being used in interstate commerce or the amount due on traffic balances arose out of transactions in such commerce, but because the suit "necessarily and unreasonably" burdened interstate commerce. The court said, (p. 103):

> "The Santa Fe is a Kansas corporation. It had not been admitted to Texas as a foreign corpora-

> tion. It had not consented to be sued there. It did not own or operate any line of railway within the state; and had no agent there. The Texas statutes concerning garnishment were construed and applied in the Wells suit so as to permit a citizen and resident of another state to prosecute in Texas a cause of action which arose elsewhere against a railroad corporation of another state, which is engaged in interstate commerce, which neither owns nor operates a railroad in Texas, and which has not consented to be sued there. For the reasons stated in *Davis v. Farmers Co-op. Co.*, 262 U. S. 312 (decided since the entry of the judgment here under review) such a suit necessarily and unreasonably burdens interstate commerce; and the statute as construed and applied is invalid."

The Court in its decision distinctly pointed out that the rolling stock and traffic balances were not immune from seizure by attachment or garnishment but the writ of garnishment was invalid because the purpose for which it was invoked imposed a burden upon interstate commerce.

Michigan Central R. R. Co. v. Mix, 278 U. S. 492, was an action based upon the Federal Employers' Liability Act against a Michigan corporation, brought in Missouri. This Court, on certiorari, reviewed a judgment of the Supreme Court of Missouri denying the application of the railway company for a writ of prohibition to enjoin the judges of the lower court from trying the action. Plaintiff's intestate, a resident of Michigan, was killed in Michigan while employed by the defendant. Summons was served upon the agent in charge of an office maintained by defendant at St. Louis for the purpose of soliciting freight for transportation in interstate commerce over its lines in other states. The railroad

had no lines in Missouri, and its operations in the state consisted of soliciting business. When the cause of action accrued in Michigan the plaintiff was a resident of Michigan, but before suit was brought, she removed to Missouri and became a resident of that state. It was pointed out by this court in its decision that this case differed from the Davis and Wells cases only in that in each of these cases the plaintiff was a non-resident, while here the plaintiff had become a resident of Missouri after the injuries complained of but before instituting the action. The judgment of the state court was reversed on the ground that the trial of the action for damages in Missouri would entail a heavy burden upon and unreasonably obstruct interstate commerce. In the decision the court says, page 495:

> "The case is unlike others in which the jurisdiction was sustained against a non-resident railroad. In *Missouri ex rel. St. Louis, Brownsville & Mexico Railway Co. v. Taylor*, 266 U S. 200, it appeared that the shipment out of which the cause of action arose was of goods deliverable in Missouri; and also that the negligent acts complained of may have occurred within the state. In *Hoffman v. Missouri ex rel. Foraker*, 274 U. S. 21, the railroad was organized under the laws of the state, and operated a part of its line in the county in which the action was brought."

It appears therefore that both the Taylor case and the Foraker case, cited by petitioner in its brief, were passed upon and differentiated by the court in the Mix case.

Denver & R. G. W. R. Co. v. Terte, 284 U. S. 284, reaffirms the decision in the Mix case and is decisive of all issues in the present case. In the Terte case one Curtis brought an action seeking damages under the

Federal Employers' Liability Act for a personal injury sustained in Colorado, alleged to have occurred through the joint negligence of the Santa Fe and the Rio Grande Railroads. The action was brought in Missouri, to which state Curtis had removed and had become a bona fide resident and citizen, after being injured. The Rio Grande Railway was a Delaware corporation, which did not own or operate any line of railway in Missouri, and was not licensed to do business in that state, but did own and use property there, maintained one or more offices there and employed agents who solicited traffic. The Santa Fe Railway was a Kansas corporation and owned and operated railroad lines in Missouri and other states. It was licensed to do business in Missouri. Summonses were served upon agents of both the Santa Fe and Rio Grande Railways in Missouri and a writ of attachment against the Rio Grande was served upon several railroad companies alleged to be indebted to it. This Court was called upon to review the refusal of the Supreme Court of Missouri to grant an application by the Rio Grande Railway for a writ of prohibition to restrain Ben Terte, judge of the Circuit Court of Jackson County, Missouri, from entertaining jurisdiction of the action brought by Curtis.

Following the Hoffman case, this Court held that the Santa Fe Railroad was properly sued in Missouri, but that under the rule in the Mix case the Rio Grande Railway was not required to defend the action there. It was held that the prohibition against burdening interstate commerce cannot be avoided by attaching the property of a non-resident railroad corporation, and the court says, page 287:

> "Obviously, the burden and expense which the carrier must incur in order to make defense in a State where the action did not occur has no rela-

tion to the nature of the process used to bring it before the court.

"The alleged residence in Missouri of persons whose testimony plaintiff supposed would be necessary to prove his claim was not enough to justify retention of jurisdiction by the Circuit Court. While this circumstance might enable plaintiff to try his case there with less inconvenience than elsewhere, it would not prevent imposition of a serious burden upon interstate commerce. And, we have held, it is the infliction of this burden that deprives the courts of jurisdiction over cases like this. *Davis v. Farmers Co-op. Co.*, 262 U. S. 312. Further, as a practical matter, courts could not undertake to ascertain in advance of trial the number and importance of probable witnesses within and without the state and retain or refuse jurisdiction according to the relative inconvenience of the parties."

II.

Petitioner is not a resident of Minnesota.

Petitioner's brief (p. 13) argues there is one ground upon which the instant case may be distinguished from the Davis and subsequent cases in this Court. This ground is that petitioner, being a Delaware corporation qualified to do business in the state of Minnesota, is a resident of the state of Minnesota, whereas, in the Davis case and some of the subsequent cases the plaintiff was a non-resident of the state in which the action was brought.

While the residence of a plaintiff is not controlling,—the issue being the burden upon the defendant,—the

statement that petitioner is a resident of Minnesota is erroneous. The Plaintiff, a Delaware corporation, does not acquire residence in Minnesota by reason of the maintenance of its principal place of business in the state. The rights of a citizen of one state to all the privileges and immunities of citizens of other states are limited to natural persons and do not extend to corporations as citizens of the state where created. The privilege of such corporation to do business in another state is permitted by comity alone and does not rest upon any natural right,—being an artificial person it has no natural rights. A corporation cannot be considered a citizen and an inhabitant or a resident of a state in which it is not incorporated. *Shaw v. Quincy Mining Co.*, 145 U. S. 444; *Southern Pacific Co. v. Denton*, 146 U. S. 202.

In *Railroad Co. v. Harris*, 12 Wall. 65, 81, it is said that a corporation cannot migrate but may extend its business into another state by meeting requirements of that state. To the same effect is *Magna Oil & Ref. Co. v. White Star Refining Co.* (3 C. C. A.) 280 Fed. 52, at page 62.

III.

Even if petitioner were a resident of Minnesota (which is denied) this case comes within former decisions of this court.

On this phase of the question we call the court's attention specifically to the Terte case already cited. It will be particularly noted that in this case the plaintiff was definitely and positively a resident and citizen of the state in which suit was instituted, a bona fide resi-

dent and not such a resident as petitioner in the present case.

As to petitioner's comment on the Terte case at page 19 of its Brief where it states that "this Court has not passed on the precise situation here involved where we have a suit (a) by a resident plaintiff, (b) against a foreign corporation, (c) operating in the state, (d) on a cause of action which arose outside the state."—

Petitioner is something less than candid in this statement. If we should assume, while not admitting, that petitioner is a resident of Minnesota and that respondent is doing some interstate business in Minnesota—the view of the facts most favorable to the petitioner possible under the record, this case should be stated as follows:—A suit (a) by a resident plaintiff, (b) against a foreign corporation, (c) not operating in the state except in interstate commerce, and (d) on a cause of action which arose outside the state.

Every issue presented in this statement of the present case has been decided contrary to the contentions of petitioner by the Terte Case, the last case decided by this Court upon the questions here involved.

Petitioner in support of the comment at page 19 of its brief to which we have referred, cites *American Railway Express Company v. Rouw Company*, 173 Ark. 710, 294 S. W. 401. In that case the Express Company had qualified to do business in the State of Arkansas and in compliance with the statute had designated an agent upon whom process might be served, 294 S W. pp. 403-4; facts which clearly distinguish it from the instant case.

IV.

Respondent is not engaged in business in Minnesota.

The petitioner contends that respondent was doing business in the state of Minnesota. This argument, however, is answered by *Texas Transport & Terminal Co. v. New Orleans,* 264 U. S. 150. In that case it was held that a state license tax cannot be laid upon the business of a corporation employed as agent by owners of vessels engaged exclusively in interstate and foreign commerce, where its business is soliciting and engaging of cargo, naming vessels to carry it, arranging for delivery on wharf and for unloading, issuing bills of lading, collecting freight, paying ships disbursements and other incidental matters.

See also the later case of *Di Santo v. Pennsylvania,* 273 U. S. 34, holding that a state statute requiring a person engaged in the sale of steamship tickets or orders for transportation to or from foreign countries, to procure a license, is a direct burden on foreign commerce contravening the commerce clause of the Constitution.

The waters navigated by respondent's ships, irrespective of the Constitution of Minnesota, are free to commerce for they are navigable waters of the United States.

Gibbons v. Ogden, 9 Wheaton 1;

Gilman v. Philadelphia, 3 Wall. 713;

Gibson v. United States, 166 U. S. 269;

United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53;

Greenlead Johnson Lbr. Co. v. Garrison, 237 U. S. 251.

V.

Summary.

It appears conclusively in the present action that the purported levy of attachment and service of process do impose a burden on interstate commerce. Respondent denies that petitioner is a resident of Minnesota, but if it were the residence of a plaintiff in the state in which an action is brought is not determinative of the question of whether a suit brought in a state does not impose a burden upon interstate commerce. The issue relates to the defendant.

In the petition (p. 5) suggestion is made as to the great importance of this case and the settlement of the law upon the questions here involved as bearing upon what it is conceived may be the effect upon some future contingency. It is sufficient to say that upon the facts as presented in this case, the law is well settled.

It therefore appears that a state court has decided a federal question of substance which has been definitely and positively determined by this court, and that the state court has decided this question in a way positively in accord with applicable decisions of this court.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1933

No. 561

INTERNATIONAL MILLING COMPANY,

PETITIONER,

vs.

COLUMBIA TRANSPORTATION COMPANY,

RESPONDENT.

Brief for Respondent

STATEMENT

While petitioner's Statement of Facts (Brief, 3 to 7) indicates in general the case, we deem it advisable to restate the facts somewhat more in detail.

Both the petitioner, plaintiff below, and the respondent, defendant below, are foreign corporations, not residents of Minnesota. Both are incorporated under the laws of Delaware. Respondent is not qualified under the Minnesota law, and does not operate any property in Minnesota; it carries on no activities in the State, except those incidental to transportation of cargoes by water in interstate business (R. 15), maintains no office in the State, has no general agent in the State and navigates its vessels to the port of Duluth-Superior only over navigable waters of the United States.

On or about December 13, 1929, the Columbia Steamship Company, an Ohio corporation, entered into a contract at Cleveland, Ohio, through D. Sullivan & Company, agents, with International Milling Company, a Delaware corporation, for the storage at South Chicago of a cargo of grain to be held in the Steamer "W. C. Richardson", and thereafter transported to Buffalo after the opening of navigation in the spring of 1930, and there unloaded (R. 40). Pursuant to that contract, as stated in the complaint (R. 3), the cargo was loaded on the Steamer "W. C. Richardson" (not the vessel attached in this action) about January 1, 1930, and was held in storage at South Chicago until about May 1, 1930, when it was transported to Buffalo, New York, arriving there on or about May 7th. Some days thereafter part of the cargo was discovered to be damaged, whereupon the cargo was unloaded and reconditioned. The damage sustained, as stated in the complaint (R. 5), amounted to something over $19,000.00. It does not appear whether the damage to the grain occurred during the storage period at South Chicago, or while on voyage, or whether after arrival at Buffalo. Neither during the storage nor during the transportation was the "Richardson" within the State of Minnesota, and there is no claim that the contract was made, or that the damage to the grain was sustained, in Minnesota.

To recover for the damage, petitioner, International Milling Company, filed a libel in admiralty in the United States District Court at Buffalo, New York, in rem against the said Steamer "W. C. Richardson", then owned by the Columbia Steamship Company. The damages sought in that suit were the same and arose out of the same cause of action, as those involved in the present case. The "Richardson" was seized and duly released by the filing of a bond. Exceptions were filed to the libel on the ground

that admiralty had no jurisdiction over the winter storage portion of the contract. The exceptions were sustained, the libelant being given 20 days within which to amend, and the case was dismissed at libelant's costs when no amended libel was filed (R. 21). During the pendency of the proceeding in the Admiralty Court at Buffalo, libelant's attorneys inquired whether the Columbia Steamship Company would enter appearance and defend in an action to recover for the alleged damages to be brought at law in the State or Federal Court at Buffalo (R. 21). On or about February 4th, 1931, the Columbia Steamship Company, by its attorneys, agreed that it would enter appearance and defend in an action at law to be brought in United States District Court at Buffalo (R. 21).

Such action was never instituted. The next proceeding was a suit brought by Chance W. Clark, a citizen of Ohio, as assignee of petitioner, in the District Court of St. Louis County, Minnesota, at Duluth, against the Columbia Steamship Company, an Ohio corporation. Service of process and a writ of attachment in this action were vacated for the reason that to allow the action to proceed would have operated to place an unreasonable condition, burden and restraint on interstate commerce (R. 24-25). The order in that case was entered on February 29, 1932 (R. 25).

Respondent in the present proceeding, Columbia Transportation Company, of Delaware, was incorporated on or about November 5, 1931, and on or about December 28, 1931 (R. 19), acquired and took over the property, business and activities of the Columbia Steamship Company, of Ohio, including the steamers that were owned by said Steamship Company (among others the Steamers "W. C. Richardson" and "C. Russell Hubbard"), and assumed

the liabilities of said Columbia Steamship Company. The Columbia Steamship Company thereupon discontinued business.

The present suit against Columbia **Transportation** Company was instituted on or about June 17, 1932, in the State District Court at Duluth, Minnesota, by the International Milling Company to whom the cause of action herein involved presumably was reassigned by Chance W. Clark. Purported service of summons was made upon the Captain of the "C. Russell Hubbard", a ship owned by respondent, and writ of attachment was levied upon said vessel while moored at a dock at Allouez, Wisconsin, there being unloaded by the dock crew (R. 14). The Steamer was released upon the filing of bond.

Respondent, Columbia Transportation Company, of Delaware, and the Columbia Steamship Company, of Ohio, before it discontinued business, had operating offices in Cleveland, Ohio (R. 17); neither ever had any agents in Minnesota, except as from time to time an agent might be designated under limited authority to sign bills of lading or perform such other services as might be necessary to enable their ships to engage in interstate or foreign commerce. All cargoes for said steamers were arranged through the offices of the respective companies at Cleveland. Neither company solicited business in Minnesota and neither company made or performed any contracts within that State or carried on any activities therein, except as incidental to the shipping and delivery of cargoes in interstate and foreign commerce (R. 16). From the time of its incorporation up to the time of bringing of this suit respondent, Columbia Transportation Company, of Delaware, operated but one steamer, the "C. Russell Hubbard" (R. 16).

The Minnesota Supreme Court summarized the activities of the respondent as follows:

> "Defendant has no office or agent and does no business in or local to Minnesota. Occasionally it discharges interstate cargoes at Duluth" (R. 68).

The record shows that none of defendant's witnesses reside in Minnesota, the witnesses upon whom it must rely residing in Wisconsin, Michigan, Illinois and New York. The Trial Court found, and the Supreme Court of Minnesota considered that finding controlling upon it, "that the defendant would be greatly harassed by having to defend the action in Minnesota" (R. 69).

Petitioner in its Statement of Facts (Brief, bottom page 3), says that the Columbia Transportation Company "operates its vessels in interstate commerce in Minnesota waters", and on page 4, that respondent "operates all of its vessels which touch the ports of Duluth, Minnesota, and Superior, Wisconsin, over approximately ninety miles of water over which the State of Minnesota has territorial jurisdiction", referring to page 42 of the record. These statements are based on the affidavit of H. A. Carmichael. This affidavit merely states that the vessel attached "proceeded about ninety miles through waters over which the State of Minnesota and the State of Wisconsin had concurrent jurisdiction." These statements are confusing in that distinction is not made between the waters within the boundaries of Minnesota, as defined in the Constitution, and the waters outside of these boundaries over which Minnesota is given *concurrent* jurisdiction. And in petitioner's statement is a further misapprehension respecting the character of the waters traversed by respondent's ship in that whether these waters are within the territorial limits of Minnesota or within the concurrent jurisdiction of that

State, they are not State waters but navigable waters of the United States. The record shows that the ship attached in this action, prior to the attachment, had not come into Minnesota or Minnesota waters (R. 13).

Respondent appearing specially in the State District Court, moved that the service of summons and levy of writ of attachment be set aside and vacated for the reason that to allow the action to proceed would place unreasonable conditions, burdens and restraints upon interstate commerce (R. 12). The District Court granted that motion. The Supreme Court of Minnesota sustained the ruling of the District Court (R. 76, 81). (250 N. W. 186, 190).

SUMMARY OF ARGUMENT

I. Maintenance of a Suit against a Foreign Corporation engaged in Interstate Commerce on a Cause of Action arising outside the State is, in the Absence of Consent, an Unreasonable Burden on Interstate Commerce.

II. This Burden is Objectionable regardless of the Nature of the Process employed to subject the Defendant to Jurisdiction.

III. It is the Burden upon the Defendant which renders the Maintenance of such an Action Objectionable.

IV. Petitioner is not a Resident of a Citizen of Minnesota.

V. Even though Petitioner were a Resident, which is denied, this would not permit imposition of the Burden.

VI. Respondent had neither consented to be sued in Minnesota nor was it carrying on such business there as to warrant the maintenance of this Action.

VII. The Judgment of the Supreme Court of Minnesota should be Affirmed.

ARGUMENT

I.

Maintenance of a Suit against a Foreign Corporation engaged in Interstate Commerce on a Cause of Action arising outside the State is, in the Absence of Consent, an Unreasonable Burden on Interstate Commerce.

This Court, further developing its previous decisions relative to actions against non-residents, has clearly established the doctrine that the maintenance of a suit unconnected with the State against a foreign corporation engaged in interstate commerce on a cause of action arising outside the State, unreasonably burdens interstate commerce.

Davis v. Farmers' Co-operative Equity Co., 262 U. S. 312;

Atchison T. & S. F. R. Co. v. Wells, 265 U. S. 101;

Michigan Central R. Co. v. Mix, 278 U. S. 492;

Denver & R. G. W. R. Co. v. Terte, 284 U. S. 284.

The first case decided by this Court, so far as we have been able to find, which, basing its holding expressly on the commerce clause, holds that such an action may not

be maintained, is the case of *Davis v. Farmers' Co-operative Equity Co.*, supra. In this case a Kansas corporation instituted a suit in Minnesota against another Kansas corporation to recover for loss of grain in transit between two points in Kansas. The defendant maintained in Minnesota an agent for the solicitation of traffic, but neither owned nor operated any trackage in Minnesota. Service was attempted to be made upon the local soliciting agent under a Minnesota statute permitting such service. The State Court held the service of process valid, whereupon the matter was appealed to this Court which held that the Minnesota statute "by requiring from interstate carriers general submission to suit * * * unreasonably obstructs, and unduly burdens interstate commerce," and that the purported service of process was invalid.

This case was followed by the case of *Atchison T. & S. F. R. Co. v. Wells*, supra, in which the facts were substantially similar to those in the Davis case, except that jurisdiction over the foreign corporation was attempted to be secured by garnishment and attachment of property located in Texas, where the suit was pending. This Court held that the Texas garnishment statute, when construed and applied so as to permit a citizen and resident of another state to prosecute in Texas a cause of action which arose elsewhere, against a railroad corporation of another state engaged in interstate commerce, and which neither owned nor operated a railroad in Texas, and which had not consented to be sued there, was invalid as placing an unreasonable burden upon interstate commerce.

In the case of *Michigan Central R. Co. v. Mix*, supra, the plaintiff, a resident of Missouri who had become such after the cause of action accrued but before suit was

instituted, sued a Michigan railroad corporation which maintained a soliciting agent in Missouri but which did not have a line in Missouri, on a cause of action which accrued in Michigan. This Court, following its previous decisions, held that the fact that the plaintiff had acquired residence in Missouri prior to the institution of suit was not sufficient to make the burden reasonable.

In the case of *Denver & R. G. W. R. Co. v. Terte*, supra, plaintiff who, although not a resident of Missouri when the cause of action arose, had become a bona fide resident and citizen of Missouri at the time of institution of the suit, sued the Atchison T. & S. F. R. Co. and the Rio Grande in Missouri for injuries occurring in Colorado. It appeared that the Santa Fe owned a railroad line in Missouri, was licensed to do business in Missouri and apparently there carried on an intrastate business. It was held that the maintenance of the suit in Missouri against the Santa Fe did not constitute an unreasonable burden upon interstate commerce. The Rio Grande was a Delaware corporation, and although it owned and used property in Missouri, maintained offices in the State and there employed agents who engaged in transactions incident to the procurement and delivery of traffic to be carried by it, the Rio Grande had not qualified to do business and did not own or operate any trackage within Missouri. Despite the fact that the Rio Grande owned property located in the State and had agents apparently permanently located there engaged in transactions incident to the procurement and delivery of traffic, this Court held that the maintenance of a suit in Missouri, although jurisdiction over property in the State belonging to the Rio Grande had been secured by garnishment, constituted an undue burden upon interstate commerce.

In three cases cited by petitioner where this defense was raised, this Court sustained jurisdiction. These cases are:

Missouri ex rel. St. Louis, B. & M. R. Co. v. Taylor, 266 U. S. 200;

Hoffman v. Missouri ex rel. Foraker, 274 U. S. 21;

Denver & R. G. W. R. Co. v. Terte, 284 U. S. 284 (as to Santa Fe).

The Taylor case does not involve the doctrine of the Davis and Wells cases, the question now presented for the decision of this Court, for the Taylor case was considered as one in which suit was brought in the jurisdiction where the cause of action accrued. While certain other matters are mentioned in the opinion in the Taylor case as possibly justifying jurisdiction, that this is the true basis of the decision in that case seems clear from the language of this Court in the Mix case where, at page 495, this Court says:

> "In Missouri ex rel. St. Louis, B. & M. R. Co. v. Taylor, supra, it appeared that the shipment out of which the cause of action arose was of goods deliverable in Missouri; and also that the negligent acts complained of may have occurred within the state."

Clearly the Hoffman case, supra, did not present the situation here presented for review. As stated in the opinion in that case (page 22):

> "Here the railroad is not a foreign corporation; it is sued in the state of its incorporation."

In the Terte case, supra, where jurisdiction was sustained as to one of the defendants, the Santa Fe, that

defendant not only was doing a local business when sued, but had qualified to do business in the State. The Court specifically sustained jurisdiction on the basis of the Hoffman case.

Thus it is to be noted that the Davis, Wells, Mix and Terte (Rio Grande) cases presented no facts from which the Court could infer a consent, express or implied, to be sued in the State where the action was brought, and hence jurisdiction was denied. In the Hoffman and Terte (Santa Fe) cases jurisdiction was sustained, there being consent to be sued in the State where the action was brought through incorporation (Hoffman case) or qualification (Santa Fe) under the laws of the State. In the Taylor case suit was instituted in the State where the cause of action arose and is, therefore, not analogous to the present suit.

II.

This Burden is Objectionable regardless of the Nature of the Process employed to subject the Defendant to Jurisdiction.

The burden upon interstate commerce resulting from a suit against a foreign corporation on a cause arising outside the State cannot be circumvented through employment of a particular kind of process. That this is so, is clear from the adjudications of this Court.

Atchison T. & S. F. R. Co. v. Wells, 265 U. S. 101;

Denver & R. G. W. R. Co. v. Terte, 284 U. S. 284.

Thus, in the Wells case jurisdiction was secured by garnishing rolling stock and traffic balances within the

State. In holding the garnishment improper, this Court, at page 103, said:

> "But the writ of garnishment is void because of the purpose for which it was invoked. * * * The Texas statutes concerning garnishment were construed and applied in the Wells suit so as to permit a citizen and resident of another state to prosecute in Texas a cause of action which arose elsewhere, against a railroad corporation of another state, which is engaged in interstate commerce, which neither owns nor operates a railroad in Texas, and which has not consented to be sued there."

In the Terte case this Court, at page 287, said:

> "The prohibition against burdening interstate commerce cannot be avoided by the simple device of a joint action. Nor can this be evaded merely by attaching the property of the non-resident railroad corporation. Obviously, the burden and expense which the carrier must incur in order to make defense in a state where the accident did not occur has no relation to the nature of the process used to bring it before the court."

III.

It is the Burden upon the Defendant which renders the maintenance of such an action objectionable.

While this Court has perhaps laid down no specific rules as to when such an action will or will not be objectionable, it is clear from the adjudicated cases that it is the *burden imposed upon the defendant* which renders the maintenance of the action objectionable and that in the absence of facts which render it clearly reasonable to impose the burden, the maintenance of the suit will not be allowed.

On this point the decisions of this Court are summarized in the Terte case as follows:

> "And, we have held, it is the infliction of this burden that deprives the courts of jurisdiction over cases like this."

Petitioner, on pages 21 to 25 of its brief, urges that under decisions of this Court the question of convenience or inconvenience of transporting witnesses to the State where jurisdiction is sought, is not of material importance. But as stated above, it is the burden upon interstate commerce which renders the maintenance of such suit improper, and the necessity of the carrier bringing witnesses from a distance is of importance in the determination of this branch of the matter. Thus, in the Davis case this Court said, at page 315:

> "That the claims against interstate carriers for personal injuries and for loss and damages of freight are numerous; that the amounts demanded are large; that in many cases carriers deem it imperative or advisable to leave the determination of their liability to the courts; that litigation in states and jurisdictions remote from that in which the cause of action arose entails absence of employees from their customary occupations; and that this impairs efficiency in operation, and causes, directly and indirectly, heavy expense to the carriers,—these are matters of common knowledge. Facts of which we also take judicial notice indicate that the burden upon interstate carriers, imposed specifically by the statute here assailed, is a heavy one; and that the resulting obstruction to commerce must be serious."

In the Terte case it was upon affidavits showing that the trial of the case would require the attendance of

witnesses from Colorado that the Court dismissed the action as against the Rio Grande.

Petitioner argues that the fact that in the Hoffman case and in the Terte (Santa Fe) case jurisdiction was sustained, even though in a state where the cause of action did not arise, indicates that the inconvenience of transporting witnesses is not important. In the Hoffman case the defendant railroad was sued in the jurisdiction of its incorporation where clearly it had consented to be sued. Petitioner argues that the fact that Missouri was the State of defendant's incorporation in this case was not considered important. On the contrary, this was the controlling feature in that case, as shown in the case of *Michigan Central v. Mix* where this Court says, at page 495, in referring to the Hoffman case:

> "* * * the railroad was organized under the laws of the state, and operated a part of its line in the county in which the action was brought."

In the Terte case, the Santa Fe, the defendant against whom the Court held jurisdiction might be sustained, not only was doing business in the State but had qualified under the laws of the State, this resulting in a consent to be sued in that jurisdiction.

IV.

Petitioner is not a Resident or a Citizen of Minnesota.

In the instant case the plaintiff is not an individual but a corporation organized under the laws of Delaware. The so-called "residence" of the plaintiff in Minnesota is purely the result of a presumption that it has qualified to do business in Minnesota.

A Delaware corporation cannot and does not acquire a residence in Minnesota by reason of maintaining in the State a place of business, even if its principal business is there transacted. The rights of a citzen of one State to the privileges and immunities of citizens of other states are limited to natural persons and do not extend to corporations which are considered to be citizens of the State where created. The privilege of such corporation to do business in a State other than that of its creation, is permitted by comity alone, and does not rest upon any natural right,—being an artificial person it has no natural rights. A corporation cannot be considered a citizen and an inhabitant or a resident of a State in which it is not incorporated.

By an unbroken line of decisions of this Court it has been uniformly held that for purposes of jurisdiction the residence of a corporation is considered to be in the State where incorporated, regardless of its doing business elsewhere.

See *Germania Fire Insurance Co. v. Francis,* 11 Wall. 210, where in the opinion, page 216, it is said:

> "Unlike a natural person, it (a corporation) cannot change its domicile at will, and, although it may be permitted to transact business where its charter does not operate, it cannot on that account acquire a residence there."

In *ex parte Schollenberger,* 96 U. S. 369, it is said at page 377:

> "A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter; * * *"

In *Penn. R. Co. v. St. Louis, Alton & Terre Haute R. Co.*, 118 U. S. 290, in discussing the question of jurisdiction this Court said, at page 295:

> "It does not seem to admit of question that a corporation of one state, owning property and doing business in another state by permission of the latter, does not thereby become a citizen of this state also."

See also *Shaw v. Quincy Mining Co.*, 145 U. S. 444, in which case, after reviewing earlier cases laying down the general doctrine that a corporation is considered a resident only of the State in which it is incorporated, this all-inclusive language is used, at page 450:

> "This statement has been often reaffirmed by this court, with some change of phrase, but always retaining the idea that the legal existence; the home, the domicile, the habitat, the residence, the citizenship of the corporation, can only be in the state by which it was created, although it may do business in other states whose laws permit it."

In the quite recent case of *Seaboard Milling Co. v. Chicago, etc., Railway Co.*, 270 U. S. 363, the principle set forth in the earlier case is reaffirmed. In this case the milling company brought an action at law against the railway company in the United States District Court, for the Eastern District of Missouri. The milling company was a corporation organized under the laws of Texas and the railway company was a corporation organized under the laws of Illinois and Iowa, having its principal office in Chicago, but maintaining a branch office and operating a branch line within the Eastern District of Missouri. The railway company, appearing specially, filed a plea to the jurisdiction on the ground that neither it nor

the milling company was a resident or inhabitant of the district. The plea was sustained and the action in sustaining this plea was affirmed by this Court, saying at page 366:

> "It is immaterial whether the general Federal jurisdiction in the present suit is founded upon diversity of citizenship alone, or whether the suit is also one arising under the laws of the United States, since neither the Milling company nor the Railway company is a resident of the eastern district of Missouri; a corporation being, within the meaning of the jurisdictional statutes, a resident of the state in which it is incorporated, and not a resident or inhabitant of any other state, although it may be engaged in business within such other state."

The decisions under the statute relating to removal of actions from State to Federal Courts on the ground of diversity of citizenship, are applicable to the present question. In *Southern Railway v. Allison,* 190 U. S. 326, it was held that although the state statute provides that a foreign railroad corporation, on complying with certain provisions of a state statute "shall become a domestic corporation, such fact does not affect the character of the original corporation and it does not thereby become a citizen" of the second state, "so far as to affect the jurisdiction of the federal courts upon a question of diverse citizenship". And to the same effect is *Missouri Pacific Ry. Co. v. Castle,* 224 U. S. 541.

V.

Even though Petitioner were a Resident, which is denied, this would not permit imposition of the Burden.

Petitioner, at pages 25 to 29 of its brief, argues that because the plaintiff must be presumed to have qualified to do business in Minnesota that it is in legal effect a resident of Minnesota, and that this fact justifies the maintenance of the suit in Minnesota.

That petitioner, however, does not rely upon this point seems clear from its own statements (Petitioner's Brief, 16, 17, 22) of the principles which it considers to be involved. In these statements the matter of the residence of the plaintiff is not mentioned as a material element.

While it is true that in the Davis case this Court left open the question of what, if any, effect the fact that the suit was instituted in the jurisdiction of which the plaintiff was a resident at the time of the accrual of the cause of action might have, it is submitted that this question has since been determined in the Terte case adversely to the position taken by petitioner that residence of the plaintiff is of importance.

Petitioner on this branch of the case places great reliance upon the case of *Cressey v. Erie R. Co.*, 278 Mass. 284, 180 N. E. 160. It is submitted that not only does the Cressey case not cover the situation in this case, but that it proceeds upon a misconception of the cases decided by this Court.

The Court in the Cressey case bases its entire argument upon the premise that the question involved is one of the balancing of interests and that in this balancing

the inconvenience to the plaintiff is an important and material element. It is submitted that this Court in the Terte case held that this could not be undertaken by the Court, and, at page 287, said:

> "The alleged residence in Missouri of persons whose testimony plaintiff supposed would be necessary to prove his claim was not enough to justify retention of jurisdiction by the Circuit Court. While this circumstance might enable plaintiff to try his cause there with less inconvenience than elsewhere, it would not prevent imposition of a serious burden upon interstate commerce. And, we have held, it is the infliction of this burden that deprives the courts of jurisdiction over cases like this. * * * Further, as a practical matter, courts could not undertake to ascertain in advance of trial the number or importance of probable witnesses within and without the state and retain or refuse jurisdiction according to the relative inconvenience of the parties."

It is further to be noted that in the Cressey case, the plaintiff was an individual, and was not only a resident, but was also a natural citizen of Massachusetts. The Massachusetts Court placed great weight upon the right of a natural citizen to seek redress of his grievances in the Courts of his sovereign.

While it seems clear under decisions of this Court that the rule of the Cressey case is wrong even as applied to a natural citizen, if the "corporate residence" theory of the petitioner is to obtain and a foreign corporation, through qualifying in other states, is to be accorded the privileges and rights which the Massachusetts Court thought belonged to a natural citizen, it is possible, if not probable, that many corporations would be in a posi-

tion to demand these rights and privileges in the Courts of forty-eight different jurisdictions.

It should also be noted that in the Cressey case the Court said:

> "* * * and (plaintiff) has not sought relief in the courts of any foreign jurisdiction."

Petitioner's first action seeking to recover for the damage here in question, was instituted in admiralty in the District Court of the United States at Buffalo against the Steamship "Richardson", the property of the Columbia Steamship Company. This action was dismissed. Despite an agreement (made at petitioner's request) on the part of the Columbia Steamship Company to accept service in an action at law in the United States District Court at Buffalo, there followed an assignment of the claim to a resident of Ohio who sued the Columbia Steamship Company in Minnesota. Upon the dismissal of this action the claim was reassigned to the petitioner and this suit instituted.

Petitioner, at pages 26 and 27 of its brief, takes the position that because the plaintiff's residence in the Mix and Terte cases was acquired before suit but after the cause of action had arisen, the question of the effect of the plaintiff's residence has not been determined by this Court.

It is true that in the Mix case this Court pointed out that plaintiff had changed her residence after the accrual of the cause of action, and, for aught that appeared, solely for the purpose of bringing suit in Missouri. In the Terte case, however, the Court found that the plaintiff's removal had been bona fide, and did not place any weight in the determination of that case upon the fact

that plaintiff's residence was acquired after the accrual of the cause of action.

Not only is it submitted that the question of the effect of plaintiff's residence has been determined adversely to petitioner, in the Terte case, but it is submitted that this decision is clearly sound. Even assuming petitioner's argument in relation to the balancing of interests, the interest of a plaintiff in being allowed to sue in the forum of his domicile because of the inconvenience of being forced to go elsewhere, is an interest in being allowed to sue in the forum of his domicile at the time of the institution of the suit and not the forum of his domicile at the time of the accrual of the cause of action.

To say that it is more convenient for a plaintiff to be forced to go away from the state of which he is a resident at the time of the institution of the action, to the state of which he was a resident at the time of the accrual of the action, than to go to the state where the cause of action accrued, would involve a careful weighing of convenience which this Court in the Terte case (page 28) has said no court could undertake to ascertain in advance of trial.

It therefore seems clear that if the matter of a plaintiff's residence is of any practical importance as a matter of balancing conveniences, it is the residence at the time the action is instituted. That residence at this time is of no controlling importance is definitely determined in the Terte case where this Court held that suit against one defendant was a burden, whereas suit by the same plaintiff in the same court on the same cause of action but against a different defendant was not a burden.

In this connection it should be stated that there is no benefit to petitioner, International Milling Company,

so far as expenses are concerned, in having the action tried at Duluth rather than at Buffalo or Cleveland or Chicago. All of the witnesses for the Milling Company, who would know anything about the damage, presumably live at Chicago or at Buffalo.

It is submitted that the true doctrine enunciated by this Court in the Davis case and succeeding cases is that regardless of the residence of the plaintiff, a suit against a foreign corporation in a jurisdiction unconnected with the cause of action constitutes a burden upon interstate commerce and cannot be maintained unless defendant has either expressly consented to be sued there, or its operations in the State are of such a character that consent must necessarily be implied.

VI.

Respondent had neither consented to be sued in Minnesota nor was it carrying on such business there as to warrant the maintenance of this action.

Petitioner states at page 21 of its brief, that "Four of the seven Justices of the Minnesota Supreme Court ignored or regarded as of no controlling importance * * * the fact that defendant here was operating its facilities regularly within the State of Minnesota, as surely as does a railroad."

The majority of the Justices of the Minnesota Supreme Court did not disregard the question of respondent's operations in the State of Minnesota but, on the contrary, considered it and resolved it adversely to petitioner's claim as shown from the following language of Mr. Justice Stone, who wrote the prevailing opinion. In comparing the instant case with the Terte case he said:

> "It (referring to the Rio Grande) was as much, but no more, out of Missouri in a physical sense and for all business purposes, as the defendant in the instant case is out of Minnesota" (R. 70).

Petitioner argues that the controlling feature is whether or not the defendant is operating within the State. As stated above, we believe that the true rule is whether the defendant has consented to be sued within the State either expressly (as a result of being incorporated under the laws of the State, as in the Hoffman case, or having qualified to do an intra-state business as the Santa Fe in the Terte case,) or as a result of doing business within the State, of such a character that consent to be sued there must be implied.

The doing of business by a foreign corporation in a state other than that in which it was created, has often been a matter of consideration by the courts including this court. See *Peoples Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, where, in the opinion, p. 86, this language is used:

> "The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the State or district where service is attempted."

See also *Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U. S. 264.

Petitioner in its brief endeavors to give the impression that the activities of respondent in Minnesota were similar to the activities of a railroad having trackage within the State and there operating a railroad line on regular schedule. It repeatedly says that the respondent

was operating its vessels "over Minnesota waters" (Brief pp. 3, 14, 15, 16), over "approximately ninety miles of water over which the State of Minnesota has territorial jurisdiction" (pp. 4, 12, 29); that it "operates a *line* of vessels" (pp. 14, 15, 16) *regularly* within the State (pp. 21, 22).

That the respondent was not operating a "line" of vessels "regularly" over "ninety miles" of Minnesota "territorial waters" is clearly shown by the record.

Respondent is a Delaware corporation (R. 15). It is engaged exclusively in the transportation of freight in bulk by water in interstate and foreign commerce. It has not been admitted to Minnesota as a foreign corporation. It has not consented to be sued there. It carries on no activities there except those incidental to the occasional delivery of an interstate cargo to Minnesota (R. 16). It maintains no office in the State, solicits no business there, has no agent or officer present, and navigates its vessels into the port of Duluth-Superior only over the navigable waters of the United States. Respondent only occasionally employs a man in Minnesota with a limited authority to perform certain duties incidental to the interstate carriage of its freight (R. 16). Up to the time of the purported attachment in this case the respondent was operating only one vessel, the "C. Russell Hubbard", which was not the vessel in connection with which this suit was brought, and it operated this vessel into Minnesota upon no regular schedule, but only as it secured cargoes from ports in other States or foreign ports destined to Minnesota.

The Minnesota Supreme Court, on appeal from the order of the trial court setting aside the service of sum-

mons and vacating the writ of attachment, found that the respondent did

> "* * * no business in or local to Minnesota. Occasionally it discharges interstate cargoes at Duluth" (R. 68).

It is submitted that this decision of the Minnesota court is clearly correct on the record in this case.

This Court has held that the fact that a shipping company went into a port of a State to discharge passengers and cargoes; that it had at that port agents who looked after the discharging of cargoes and passengers, did not result in the doing by the shipping company of a local business in that port.

In *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, this court said at page 203.

> "As to the first reason thus expressed, it may be answered that the business of landing and receiving passengers and freight at the wharf in Philadelphia is a necessary incident to, indeed is a part of, their transportation across the Delaware River from New Jersey. Without it that transportation would be impossible. Transportation implies the taking up of persons or property at some point and putting them down at another."

See *City of Sault Ste. Marie, v. International Transit Co.*, 234 U. S. 333.

Petitioner repeatedly states that respondent was operating its vessels over approximately ninety miles of water over which the State of Minnesota has *territorial* jurisdiction (Brief pp. 4, 12, 29), and takes the position that this fact places respondent in the same position as a railroad owning and operating trackage within the

territorial limits of Minnesota. The record does not show that the respondent operated over ninety miles of water over which the State of Minnesota has territorial jurisdiction. As pointed out on pages 4 and 5 of petitioner's Brief, Minnesota's jurisdiction and territorial limits are covered by two separate sections of the Minnesota Constitution. The first of these, Section 1, Article II, defines the boundaries of the State; the second, Section 2 of the same Article, gives to Minnesota certain *concurrent* jurisdiction *beyond* its boundaries. That portion of the record to which petitioner refers as supporting its statement, namely page 42, merely states that the attached vessel traversed approximately ninety miles of water over which Minnesota had *concurrent* jurisdiction. The attached vessel, up to the time of its attachment, had not come within the boundaries of Minnesota (R. 13).

As heretofore stated, petitioner's principal argument is that the respondent in this case was within Minnesota to the same extent as a railroad owning trackage and operating a railroad within the State, and relies upon the following language of Mr. Justice Loring in his dissenting opinion cited upon pages 24 and 25 of petitioner's Brief:

> "* * * I cannot see the distinction between operating a railroad into a state as did the Santa Fe in the Terte case and operating a line of steamships into one of its ports as in the case at bar."

This argument by petitioner is predicated upon the misinterpretation by petitioner of the affidavit of H. A. Carmichael, above referred to, for, as we have heretofore shown, the affidavit merely states that the respondent was operating over ninety miles of water over which Minnesota had concurrent jurisdiction.

In addition to the fact that petitioner in this branch of its argument has proceeded upon a misconception of facts in the record, there are further reasons why petitioner's contention that respondent was within Minnesota to the same extent as a railroad, is unsound. An analysis of the activities of a railroad owning and operating trackage within a State as compared with the activities of respondent, clearly shows differences both of fact and of applicable law.

The railroad operating in the State is there carrying on its principal function; it carries goods and passengers from point to point within the State. The respondent, on the other hand, carries on its principal function, namely, the carriage of goods by water in interstate commerce, on the navigable waters of the United States and goes within the boundaries of the State only so far as it is necessary, for obvious physical reasons, in order that it may deliver its cargoes to the State.

The railroad is operating over the land of the State and must secure its right to do this by purchase, lease, or condemnation. It is operating over territory over which the State has exclusive jurisdiction. The respondent, on the other hand, whether on waters within the boundaries of Minnesota, on waters without those boundaries but within the so-called concurrent jurisdiction of Minnesota, or whether on waters entirely outside any Minnesota jurisdiction, is operating upon the navigable waters of the United States which are free to commerce under the repeated decisions of this Court.

Gibbons v. Ogden, 9 Wheaton 1;

Gilman v. Philadelphia, 3 Wall. 713;

Illinois Central R. Co. v. Illinois, 146 U. S. 387;

Gibson v. United States, 166 U. S. 269;

United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53;

Greenleaf Johnson Lumber Co. v. Garrison, 237 U. S. 251.

It is clear that the State of Minnesota could not as a condition to the bringing of cargoes into its ports in interstate commerce over navigable waters of the United States within its jurisdiction, require the respondent to qualify under its foreign corporation laws and consent to be sued in Minnesota upon foreign causes of action. To say that operating on the navigable waters of the United States in interstate commerce, even within the boundaries of Minnesota, is tantamount to a consent to be sued in Minnesota upon foreign causes of action, would be to allow Minnesota to place a burden upon interstate commerce by indirection which this Court would not sustain if placed by direct legislation requiring express consent.

Furthermore, it is to be noted that a railroad operates on regular schedules within the State and continually has property permanently located within the State. The respondent, on the other hand, only goes to the State as it secures cargoes from other States destined to Minnesota. When, if ever, it may again go to Minnesota is a matter of conjecture. The fact that respondent had no permanence of presence not only appears from the affidavits and testimony in support of the Motion to Quash, but also from the fact that petitioner in this case did not wait for respondent to go within Minnesota territorial jurisdiction but attached the vessel while tied to a Wisconsin dock.

While it is true that the mere fact that the business carried on by a corporation is entirely interstate in character does not render that corporation immune from the

ordinary process of the courts of the State, *International Harvester Co. v. Kentucky,* 234 U. S. 579, it does not follow that the mere carrying on of some business in the State renders the foreign corporation amenable to suit upon all causes of action.

Thus in the case of *Louisville & Nashville R. Co. v. Chatters,* 279 U. S. 320, this court said:

> "Even when present and amenable to suit it may not, unless it has consented * * * be sued on transitory causes of action arising elsewhere which are unconnected with any corporate action by it within the jurisdiction. * * * "

To recapitulate—It is submitted that the true doctrine regarding the maintenance of a suit against a foreign corporation, engaged in interstate commerce, in a jurisdiction unconnected with the cause of action, as enunciated by this Court in the Davis and succeeding cases, is that unless the foreign corporation has consented to be sued in the jurisdiction, or is there carrying on such business as to result in a consent to suit upon foreign causes of action, the maintenance of the suit constitutes an unreasonable burden upon interstate commerce. In the Davis, Wells, Mix and Terte (Rio Grande) cases where no facts from which the Court could infer a consent were present, jurisdiction was denied; whereas in the Hoffman case, where the defendant was sued in the State of its incorporation, and in the Terte case (Santa Fe) where defendant was sued where it had qualified to do business, each presenting clear cases of consent, this Court sustained jurisdiction. Respondent's operations in this case clearly are not such that a consent to be sued in Minnesota upon foreign causes of action may be implied, for, as shown above, its operations upon the navigable waters of the United States, even though within the boundaries of Minnesota,

cannot have this result. Its activities on land were less than those in the Terte case where the Rio Grande "maintains one or more offices in the state and employs agents who solicit traffic. These agents engage in transactions incident to the procurement, delivery and record of such traffic". As stated by Mr. Justice Stone in the majority opinion in this case:

> "It (referring to the Rio Grande) was as much, but no more, out of Missouri in a physical sense and for all business purposes, as the defendant in the instant case is out of Minnesota" (R. 70).

VII.

The Judgment of the Supreme Court of Minnesota should be Affirmed.

We submit that the decision of the Supreme Court of Minnesota, sustaining the judgment of the trial court, that this case "comes squarely within the theory of the controlling decisions of the Supreme Court of the United States" (R. 68), is correct and should be affirmed by this Court.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 561.—October Term, 1933.

International Milling Company, Petitioner, *vs.* Columbia Transportation Company, Respondent.	On Writ of Certiorari to the Supreme Court of the State of Minnesota.

[May 28, 1934.]

Mr. Justice Cardozo delivered the opinion of the Court.

Petitioner, plaintiff in the court below, is a Delaware corporation, a dealer in grain, with its principal office and place of business in Minneapolis, Minnesota. Respondent, defendant below, is also a Delaware corporation, a carrier by water, with its principal office in Cleveland, Ohio. We are to determine whether in the circumstances exhibited in the record a suit between the parties in the courts of Minnesota is an unreasonable burden upon interstate commerce.

On January 1, 1930, petitioner loaded a cargo of grain on one of the vessels of respondent's predecessor for transportation and storage. This vessel was the W. C. Richardson, and the termini of the voyage were Chicago and Buffalo. At one of those points or somewhere between them the grain was negligently handled while in the carrier's possession with ensuing damage discovered about the end of 1930. The defendant in this suit is a successor corporation, which took over the business in December, 1931, and assumed its liabilities.

The new corporation, like its predecessor, is a carrier of merchandise in interstate and foreign commerce, picking up cargoes where it can get them, but principally along the Great Lakes and in tributary waters. It has a fleet of ten steamers which it uses for that purpose as occasion requires. Owing to slack business, the only vessel in commission during the first half of 1932 was the C. Russell Hubbard, which operated principally between ports on Lakes Superior and Michigan. On July 1, 1932, this vessel arrived

at Duluth, Minnesota, carrying a cargo of coal from Sandusky, Ohio. While unloading in neighboring waters she was seized by the sheriff under a writ of attachment sued out by the petitioner in a District Court of the state. The summons and the attachment writ were served on the master of the vessel, who made report of the proceeding to the respondent's agents at Duluth. These agents, a firm of vessel brokers, were employed by the respondent as its Duluth representatives to act for it as might be necessary when its boats were at the dock. They saw to it that the cargoes were loaded and unloaded, reported to their principal the coming and going of the vessels, and issued bills of lading. Notice of an expected cargo came to them by telegraph, for there was no regular schedule to put them on the watch. Payment was by the job, $10 for each cargo. Like services had been rendered by the same agents since 1928, and, it may be, even earlier. Just how often they had acted, the record does not tell us, though presumably the facts were within the knowledge of the principal. If there may be inferences from silence, we draw them against the party who bears the burden of persuasion.

Promptly upon the seizure of the vessel, the respondent filed an undertaking in the sum of $40,000, whereupon the levy was released. Then, appearing specially, it moved to vacate the attachment and the summons upon the ground that the prosecution of the action in the state of Minnesota would impose a serious and unreasonable burden upon interstate commerce, in contravention of Article I, Section 8, of the Constitution of the United States. The District Court granted the motion. The Supreme Court of Minnesota affirmed, three judges dissenting. 189 Minn. 507; 250 N. W. Rep. 186. Later there was a final judgment in the District Court, and again an affirmance on appeal. 189 Minn. 516; 250 N. W. Rep. 190. A writ of certiorari has brought the case here. 290 U. S. 622.

Our point of departure is the decision of this court in *Davis* v. *Farmers' Cooperative Equity Co.*, [1923] 262 U. S. 312. There a Kansas corporation brought suit in Minnesota against the Director General of Railroads, representing the Atchison, Topeka & Santa Fe Railway Company, also a Kansas corporation. The plaintiff was not a resident of Minnesota, nor engaged in business there. The railway company was not a resident of Minnesota, and did no

business there, except to solicit traffic. The cause of action had no relation to any local activity. Service of process was made in reliance upon a Minnesota statute (Laws of 1913, c. 218, p. 274) whereby every foreign interstate carrier was compelled "to submit to suit there as a condition of maintaining a soliciting agent within the State". 262 U. S. at pp. 313, 315. Upon those facts the ruling of this court was that the effect of the statute, when applied to a carrier so situated, was an unreasonable obstruction of interstate commerce. The decision was confined narrowly within the bounds of its own facts. "It may be," the court said (262 U. S. at p. 316), "that a statute like that here assailed would be valid although applied to suits in which the cause of action arose elsewhere, if the transaction out of which it arose had been entered upon within the State, or if the plaintiff was, when it arose, a resident of the State." The facts in the *Davis* case were substantially identical with those in *Atchison, Topeka & Santa Fe R. Co.* v. *Wells*, 265 U. S. 101, decided a year later. Then, in 1929, *Michigan Central R. Co.* v. *Mix*, 278 U. S. 492, enforced the same conclusion where the plaintiff, a resident of Michigan at the time of an accident, sued a Michigan railway company in Missouri upon a Michigan cause of action, though the defendant's only activity in Missouri was the maintenance of an agency for the solicitation of business. The suit was not saved because the plaintiff had moved into Missouri "after the injury complained of, but before instituting the action." "For aught that appears her removal to St. Louis shortly after the accident was solely for the purpose of bringing the suit; and because she was advised that her chances of recovery would be better there than they would be in Michigan." (278 U. S. at p. 495.) There was no proof of such a relation between the residence or activities of the suitor and the forum chosen for the suit as to make the choice a natural or suitable one, and rid the burden on the carrier of at least a measure of its hardship.

To be contrasted with these cases where jurisdiction was denied because of the necessities of commerce is another series of cases where differentiating circumstances led to a different result. Thus, in *State of Missouri ex rel. St. Louis, Brownsville & Mexico R. Co.* v. *Taylor*, [1924] 266 U. S. 200, a Delaware corporation with a usual place of business in Missouri brought suit in a Missouri court against the St. Louis, Brownsville & Mexico Railway Company, a Texas corporation, operating a railroad in Texas and no-

where else, jurisdiction being asserted solely by reason of the garnishment of traffic balances due from a connecting carrier. The cause of action was for damages to freight originating in Texas on lines of the Brownsville Company and shipped on through bills of lading to points in Missouri as well as other states. This court rejected the carrier's contention that *Davis* v. *Farmers' Cooperative Equity Co., supra,* and *Atchison, Topeka & Santa Fe R. Co.* v. *Wells, supra,* supplied the applicable rule. The opinion pointed out (1) that for anything made to appear the negligence of the connecting carrier may have occurred in Missouri where the goods were to be delivered, and (2) that "the plaintiff consignee is a resident of Missouri—that is, has a usual place of business within the State." "To require that, under such circumstances, the foreign carrier shall submit to suit within a State to whose jurisdiction it would otherwise be amenable by process of attachment does not unreasonably burden interstate commerce." 266 U. S. at p. 207. In line with that decision is *Denver & Rio Grande Western R. Co.* v. *Terte,* [1931] 284 U. S. 284, where the plaintiff, a resident of Missouri, had brought suit in a Missouri court upon a cause of action for personal injuries suffered in Colorado. There were two defendants, the Rio Grande railway company and the Santa Fe. The first, a Delaware corporation, did not operate a railroad in Missouri, but had a traffic agency only. As to it the suit was dismissed upon the authority of the *Davis* case. The other defendant had part of its line in Missouri, though the accident occurred elsewhere. Cf. *Hoffman* v. *Foraker,* 274 U. S. 21. As to the defendant so situated, jurisdiction was upheld. The groups are clearly marked, and also the reasons for the grouping.

The question now is whether the defendant with its steamship business shall be placed in the one group or the other. At the outset, we mark the fact that the petitioner, though a Delaware corporation, is suing in the state of its business activities. For many purposes, its domicile in law is in the state of its creation (*Shaw* v. *Quincy Mining Co.*, 145 U. S. 444; *Seaboard Rice Milling Co.* v. *Chicago, R. I. & P. R. Co.*, 270 U. S. 363), but it is living its life elsewhere. In a very real and practical sense, it is a resident of the forum, like the plaintiff in the *Taylor* case (266 U. S. 200, 207), who was domiciled in one state and resided in another. Certainly its relation to the locality was so permanent and intimate as to

relieve it of the opprobrium of an impertinent intruder when it went into the local courts. In saying this we do not hold that the residence of the suitor will fix the proper forum without reference to other considerations, such as the nature of the business of the corporation to be sued. *Denver, Rio Grande & Western R. Co.* v. *Terte, supra,* is opposed to such a holding. Residence, however, even though not controlling, is a fact of high significance. Our next inquiry must be whether there is anything in the nature of the activities of the defendant to overcome its force.

The defendant, though an interstate carrier, does not do business like a railroad company along a changeless route. It is engaged in transportation in Minnesota as much as it is engaged in transportation anywhere, if we exclude the activities of management that have their centre in Ohio. Its vessels navigate the waters of Lake Superior, not merely occasionally, but by long continued practice, and Minnesota and Wisconsin maintain over the boundary waters of that lake a concurrent jurisdiction. Constitution of Minnesota, Art. II, section 2; Constitution of Wisconsin, Art. IX, section 1. At Duluth a designated agent does whatever is necessary to facilitate the work of loading and unloading cargoes, and in the waters near at hand there was a levy of an attachment upon property brought into the state in the usual course of business. When subjected to this levy, the carrier was not engaged in some incidental or collateral activity, such as the solicitation of freight to be carried at other times and places. It was engaged, when thus subjected, in the very act of transportation, the dominant end and aim of its corporate existence.

Viewing all these circumstances together, we find ourselves unable to conclude that by the prosecution of this suit there has been laid upon the carrier a burden so heavy and so unnecessary as to be oppressive and unreasonable. Rather we find a situation where the defendant, chargeable with knowledge of the attachment laws of Minnesota, brought its property into that state, not fortuitously or by a rare accident, but in furtherance of a systematic course of business, and thereby subjected itself to suit, *quasi in rem*, at the instance of a local creditor, who could not with equal convenience or facility have sued it anywhere else. Such a suit may be a burden, but oppressive and unreasonable it is not. There is no occasion to determine whether the conclusion would be the same

if an attachment had been levied upon property brought within the state through the voluntary act of the defendant, but in an isolated instance, dissevered from a course of dealing. In the circumstances of this case, *Missouri ex rel. St. Louis, Brownsville & Mexico R. Co.* v. *Taylor, supra,* and *Denver & Rio Grande Western R. C.* v. *Terte, supra,* to the extent that the latter case involved a suit against the Santa Fe, supply, when read together, the applicable rule, and sustain the jurisdiction of the Minnesota courts.

The forum being in other respects appropriate, jurisdiction is not lost because the property subjected to the attachment is an instrumentality of commerce (*Atchison, Topeka & Santa Fe R. Co.* v. *Wells, supra,* p. 103; *Davis* v. *Cleveland C. C. & St. L. R. Co.,* 217 U. S. 157), nor because the chief witnesses on the trial reside in other states, most of them, it seems, in Chicago, Illinois. "As a practical matter, courts could not undertake to ascertain in advance of trial the number and importance of probable witnesses within and without the State and retain or refuse jurisdiction according to the relative inconveinence of the parties." *Denver & Rio Grande Western R. Co.* v. *Terte, supra,* p. 287; *Hoffman* v. *Foraker, supra,* p. 22.

The judgment should be reversed and the cause remanded to the Supreme Court of Minnesota for further proceeding not inconsistent with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.